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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 88

In the Matter of Disciplinary Proceedings Against
NEIL S. MACKAY, an Attorney at Law,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA.

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IN THE

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October Term, 1964

No. .....

In the Matter of Disciplinary Proceedings Against NEIL S. MACKAY, an Attorney at Law,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA.

Petitioner Neil S. Mackay prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alaska which suspended the defendant petitioner from the practice of law for one year.

Opinion Below.

The first opinion of the Supreme Court of Alaska was filed October 26, 1964. It is unreported and is printed as Appendix "A" to this petition. A rehearing was granted. The second opinion of the Supreme Court of Alaska, which relies upon facts recited in the first opinion, was filed January 30, 1965. It is unreported and is printed as Appendix "B" page 21 to this petition.

Jurisdiction.

1. The opinion of the Supreme Court of Alaska was filed January 30, 1965. The order of the court which suspended the petitioner from practice of law for one year was filed the same day. (Appendix p. 33).

2. Jurisdiction of this court is invoked under 28 U.S.C.A. 1257 (Para. 3).

3. The petitioner raised federal questions and questions arising under the Constitution of the United States which are sought to be reviewed by this petition, as follows:

(a) By oral and written argument before the Alaska Supreme Court (the proceedings which are here declared to be a violation of petitioner's constitutional rights were initiated in the Alaska Supreme Court). (Appendix A, p. 7, Appendix H, p. 55, Appendix I, p. 56).

(b) By petition for rehearing after opinion by the Alaska Supreme Court, dated October 30, 1964 (Appendix E, p. 36).

(c) By brief filed with the Alaska Supreme Court before final opinion (Appendix F, p. 48).

Questions Presented.

1. Did the Supreme Court of Alaska deprive petitioner Mackay of his right to have the United States District Court for Alaska decide federal and constitutional questions?

2. Were the judges of the Supreme Court of Alaska biased by reason of their position as defendants before the United States District Court for Alaska so as to disqualify them from deciding federal and constitutional questtions?

3. Did the Supreme Court of Alaska deprive this petitioner of property without due process of law and

fail to give him the equal protection of the laws when it suspended him from the practice of the law:

(a) By a decision based on facts taken from incomplete uncertified hearsay copy of a transcript of notes from a stenographer who had no official position?

(b) By failing to give petitioner due notice of charges against him, the right to confront witnesses called against him, and the right to cross-examine said witnesses?

(c) By giving retroactive effect to a rule of court in a bar discipline case?

4. After acquittal of charges against petitioner by the administrative authority which was authorized to hear such charges by the Alaska statute, is the Supreme Court of Alaska estopped to revive and reconsider these charges?

Statutes Involved.

Alaska Statutes.

The Alaska State Bar Act.

This statute which was declared unconstitutional by the Alaska Supreme Court is Paragraph 14, Chapter 196, Session Laws of Alaska, 1955, known as the Alaska Integrated Bar Act, as amended by Paragraph 6, Chapter 178, Session Laws of Alaska, 1960 (codified as Chapter 08. Section 08.08.220, Alaska Integrated Bar Act, Alaska Statutes Annotated, Indexed and Printed by the Mitchie Company).

Act of Congress.

Sections 1 and 8, the Alaska Statehood Act (Public Law 85-508, July 7, 1958; 72 Stat. 339).

Statement of the Case.

In 1955 the Territorial Legislature of Alaska enacted the "Alaska Integrated Bar Act" which created "an instrumentality of Alaska to be known as the Alaska Bar Association" (¶ 1 ch. 196 Session Laws of Alaska 1955). This Association was given corporate powers and was to be governed by a board of governors consisting of nine active members of the Alaska Bar elected from four judicial districts. The board was authorized to adopt rules and conduct proceedings for admission, discipline, suspension and disbarment of members of the Association (¶¶ 2-14, incl., ch. 196 Session Laws of Alaska 1955).

The Alaska Statehood Act of 1958 provided in Section 8(d):

> "Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. . . ." (72 Stat. 339.)

The Alaska Integrated Bar Act thereby became the law of the new state of Alaska.

The Constitution of Alaska in Article XV, §1 provided:

> "All laws in force in the territory of Alaska on the effective date of this constitution and consistent therewith shall continue in force until they expire by their own limitation, are amended, or repealed."

Section 1 of the Statehood Act confirmed and accepted the Alaska Constitution.

Some amendments were made by the Alaska State Legislature as was required by the change from territory to state (see Amendments to Integrated Bar Act, ch. 178 SLA 1960). Section 2 of the Act was amended to read:

> "There is created an instrumentality of the State known as the Alaska Bar Association." (¶ 2, ch. 178 SLA 1960.)

In 1960, paragraph 14 of the Alaska Integrated Bar Act was amended to read as follows:

> "Disciplinary proceedings and review. Upon finally determining any cause involving the discipline, disbarment, suspension, or reinstatement of a member of the Alaska Bar, the board shall certify its findings and recommendations on the cause to the supreme court. Within 30 days after receiving the findings and recommendations, the court *shall issue, in full accordance with the recommendations, an order of disbarment, suspension, reinstatement, dismissal, or otherwise,* unless the accused member sooner petitions the court for review of the proceedings, findings, and recommendations of the board. If such a petition is made, the court shall promptly review the cause in the manner prescribed in the Administrative Procedure Act." (§6, ch. 178 SLA 1960 emphasis added.)

The constitution of Alaska, approved by Section 1 of the Statehood Act, created a Supreme Court of Alaska consisting of three members with limited and not full jurisdiction:

"Section 1. Judicial Power and Jurisdiction. The Judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. *The jurisdiction of courts shall be prescribed by law.* The courts shall constitute a unified judicial system for operation and administration. The judicial districts shall be established by law." (Constitution of Alaska, The Mitchie Company, 1963-64; Emphasis added.)

On June 1, 1964, the three justices of the Supreme Court of Alaska, attempted to integrate the bar of Alaska by court order. "All persons admitted to practice law in the State of Alaska are hereby organized as an association to be known as the Alaska Bar Association. . . ." (Rule 1, see Appx. J, p. 59.) The association was given corporate status (Rule 1, Appx. J, pp. 59-60). It provided that only active members in the court-created asociation could practice law (Rule 2, Appx. J, p. 60). It provided that the governing body of the Alaska Bar was a board of governors, consisting of nine active members elected by the active membership from the four judicial districts of Alaska (Rule 3, Appx. J, p. 63). The court has stated that these rules "superseded" the Alaska Integrated Bar Act (Opin., Appx. A, p. 6).

Rule 9 of the Court Rules radically changed the procedure for discipline of members of the Alaska Bar. It declared that the record of evidence taken before trial committees should be transferred *directly* to the Supreme Court of Alaska for review of the evidence, findings and final decision. Members of the Alaska Bar who were thereafter to be charged and tried for professional misconduct were thereby denied a review

by the board of governors as required by the Alaska Integrated Bar Act (Rule 9, Sec. 11, Appx. J, p. 80).

The Supreme Court of Alaska requested the governors of the Alaska Bar Association to act as board of governors of the integrated bar created by Court Rule 64. To a man they refused. The court acted swiftly to seize control of the existing organization. On July 23, 1964, the court purported to remove from office the members of the board of governors of the statutory bar association (Order No. 68, Appx. L, p. 105). By a so-called writ of sequestration the court seized $21,581 in the bank account of the Alaska Bar Association and forcibly seized furniture, fixtures and records from the office of the Alaska Bar Association and removed that property to the offices of the court in Anchorage (Order No. 69, Appx. M, p. 108). By Order No. 71, the court purported to remove from office the secretary of the association (Appx. N, p. 110).[1] The court threatened any member of the bar with contempt who did not comply with the rules (Appx. K, p. 100).

On July 29, 1964, the Alaska Bar Association, the nine members of its board of governors, and Peter Kalamarides, its secretary, filed suit against each justice of the Supreme Court of Alaska in the United States District Court for Alaska, to recover their offices, the property of the association, and to enjoin enforcement of the court rules. On August 24, 1964, 160 members of the Alaska Bar Association (including this petitioner) joined in the action as plaintiffs. The

[1]On September 8, 1964, Supreme Court of Alaska Order No. 72 rescinded the removal of the board of governors and, "terminated" the seizure of the funds and property of the association; and the removal of Kalamarides as executive director of the association.

plaintiffs invoked the jurisdiction of the court through 28 U.S.C. 1311-1343, 2281, 2284, 2207, 2202, and claimed a violation of rights under Article IV, paragraph 4 of the Constitution of the United States, and under the first, fourth and fourteenth amendments of the Constitution of the United States. The action is now pending. Motions in this action are set on June 14 and 15, 1965, in Anchorage, before the three-judge federal district court. The decision of the federal district court will probably not be rendered before this court adjourns for the summer recess.

Some three years before these events a complaint had been filed with the Alaska Bar Association which charged this petitioner Neil S. Mackay with professional misconduct because of acts which occurred in January 1957 and November 1959. A hearing was held before a trial committee of the Alaska Bar Association. The record of evidence and the exhibits were forwarded to the board of governors for review as required by statute and the rules of the Alaska Bar Association. After a review of the record, the board made findings of fact and voted to acquit Mackay of the charges. This was on December 1, 1961.

The statute provided that the board should certify its findings and recommendations to the Supreme Court. This was not done. The statute did not require that the record be forwarded to the Supreme Court, as the statute withheld jurisdiction from the Supreme Court of Alaska to review the evidence or to set aside the dismissal of the charges. Failure to forward findings and recommendations to the court was therefore a technical error which does not affect the merits of the questions here involved. (¶6 ch. 178 SLA 1960.)

Four days after this petitioner joined the action as plaintiff in the federal district court, the Supreme Court of Alaska revived the old charges against Mackay. It advised petitioner Mackay by letter that the court was not in accord with the findings of the board of governors which acquitted Mackay (Appx. G, p. 53). At that time no papers or record of evidence were before the court. It was acting only from hearsay.

The justices of the Alaska Supreme Court, either through pique against the organized Bar or zeal for their duties, were determined to discipline Mackay; but they had no evidence before them. The secretary of the association had closed the file. The court sought information from all over Anchorage. "The court succeeded in obtaining copies of the pleadings from a member of the trial committee, and a transcript of testimony from the court reporter." (Appx. A, p. 5.) This was the full extent of the court's record.[2]

The informal record upon which the court based all of its findings of fact and decision of October 26, 1964, was an office copy of transcribed notes which had been prepared by a stenographer named Dodd, another reporter named Runner, and a transcriber in Dodd's office (Affidavit of Dodd, Appx. E, p. 41). The court quoted liberally in its opinion from the uncertified information which it received from Miss Dodd. It never obtained the exhibits.[3]

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[2]The record which has been forwarded to this court by McPhetres, clerk of the Supreme Court of Alaska, is a collection of papers which were gathered from various souces in Alaska. The only authentic record of papers filed in that court begins with a letter to Mackay from the Court's Clerk on August 28, 1964.

[3]On September 24, 1964, petitioner Mackay appeared with counsel before the court and objected to the proceedings. He sub-

After the cause of the Alaska lawyers against the members of the Supreme Court of Alaska had been tried and argued before the three-judge federal district court, a rehearing was granted to the petitioner by the Alaska Supreme Court. A brief was promptly filed by Mackay which requested the Supreme Court of Alaska to abstain from decision until the federal and constitutional questions which had been submitted to the federal district court had been decided, citing *England v. Louisiana Medical Examiners* (1964), 375 U.S. 411, 11 L. Ed. 2d 440. The brief also suggested that the justices of the Alaska Supreme Court, as litigants before the federal district court, were disqualified to decide the federal and constitutional questions involved in the matter against Mackay (Appx. F, p. 36).

The Supreme Court of Alaska refused to abstain from decision, and on January 30, 1965, filed its second opinion with findings again based upon the uncertified transcript of stenographer's notes and without benefit of the certified transcript of evidence or exhibits which had been before the board of governors (Appx. B, p. 21). It ordered Mackay suspended from the practice of the law for one year and provided for the payment of $7,500 to either one Mary Keno or the State of Alaska (again the court departed from the record of any evidence and accepted a letter received from a deputy attorney general of Alaska as a true statement of facts ([Appx. B, p. 32]).

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sequently filed a memorandum which claimed violations of constitutional rights under the fourth, fifth and fourteenth amendments to the United States Constitution and Article I, § 7 of the Alaska Constitution. He complained that he had not been notified of charges against him and that the court did not have a "complete record" upon which to base a review of facts (Appendix I, pp. 56-57).

REASONS WHY PETITION FOR CERTIORARI SHOULD BE GRANTED.

1. The Supreme Court of Alaska Deprived Petitioner of His Right to Have Federal and Constitutional Questions Decided by the United States District Court for Alaska.

The complaint of the Alaska Bar Association and 160 of its members against the three justices prayed that the defendants be enjoined from enforcing the court rules which integrated the Alaska Bar. These rules were in the nature of statutes or administrative orders which were subject to attack on constitutional grounds (*Lathrop v. Donohue* (1961), 367 U.S. 820, 6 L. Ed. 2d 1191; *Malloy v. Hogan* (1964), 378 U.S. 1, 12 L. Ed. 2d 653). As the suit sought an injunction to restrain the enforcement of the operation of a state statute and sought to restrain the action of an officer of the state of Alaska in the enforcement or execution of such statute, it was referred to a district court of three judges (28 U.S.C.A. 2281, 2284).

The plaintiffs presented to the district court several federal and constitutional questions for decision:

(1) The right of the three justices to remove an officer of the State of Alaska from an office created by the legislature, without hearing and without cause.

(2) The right of the three justices to summarily seize money and other property from a corporation created by statute.

(3) The right of the three justices to enact rules which in effect repealed (superseded) the Alaska Integrated Bar Act.

(4) The extent to which an act of Congress (Section 8 of the Statehood Act) made the Alaska Integrated Bar Act an effective law of Alaska and the extent to which it limited the jurisdiction of these judges.

Interpretation of an Act of Congress.

When Alaska became a state, the Alaska Integrated Bar Act continued as the law of Alaska only because of Section 8(d) of the Statehood Act (*Interior Airways, Inc. v. Wien Alaska Airlines, Inc.* (1960), 188 F. Supp. 107 [Alaska]). The three justices of the Alaska Supreme Court took office subject to this act. The basic question of whether or not the act of Congress limited their jurisdiction over the Alaska Integrated Bar was before the three-judge federal district court.

A few changes in the Act have been made by the Alaska Legislature, but the basic plan of bar integration and self-discipline in the territorial statute became and still is the law of Alaska by reason of Section 8(d) of the Statehood Act.[4] The nature and effect of an act of Congress admitting a state to the Union presents a federal question (*U.S. v. Fenton* (1939), 27 F. Supp. 816 [Idaho]; *Gilchrist v. Helena Hot Spring etc.* (1893), 58 Fed. 708 [Mont.]; *In re Moore* (1897), 81 Fed. 356 [Wash.].).

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[4]The laws of Alaska were codified in 1963 by an act of the Alaska Legislature, but § 01.05.016 provides "(a) the adoption and enactment of the Alaska statutes do not repeal, affect or modify . . . (5) the continued existence and operation of a department, agency or office legally established or held; . . . (b) all laws, rights and obligations set out in (a) of this section continue to exist in all respects as if the Alaska statutes had not been adopted and enacted."

Federal and Constitutional Questions Were Pending Before the Federal District Court.

As a gesture of independence and probably as an assertion of state's rights, the three justices filed their opinion disbarring this petitioner on October 26, 1964, by application of the new court rules. By a peculiar coincidence, this was the day before the cause of the Alaska lawyers against the three justices of the Supreme Court of Alaska was called for trial before the three-judge district court. In this opinion, the Alaska court held that its rules superseded the Alaska Integrated Bar Act. This was one of the questions at issue before the federal district court. As a federal question had been presented to the federal district court, that court could decide all matters necessary for decision (*Osborn v. Bank of U.S.* (1824), 9 Wheat. 738, 6 L. ed. 204; *Silver v. Louisville & Nashville R. Co.* (1908), 213 U.S. 175, 53 L. ed. 753; *Hurn v. Oursler* (1932), 289 U.S. 238, 77 L. ed. 1148). The federal court had jurisdiction over the plaintiffs' claim that the rules of the Supreme Court of Alaska did not supersede the Alaska Integrated Bar Act.

A motion was made by the justices, as defendants, to dismiss the action in the federal district court on the ground that no federal or constitutional question was involved. After argument, that motion was denied on October 27, 1964, by the three judges of the federal district court. This decision established that an action was pending in the federal district court which did involve federal and constitutional questions.[5] The Alaska

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[5]We ask this court to take judicial notice of decisions and proceedings in the Federal District Court for Alaska. Rule 43(a), Rules of Civil Procedure, applicable, though not directly in point: *Hanley v. Donoghue* (1885), 116 U.S. 1, 29 L. ed. 535; *Zell v.*

justices, as defendants, should have respected that decision. Believing that they would do so, a petition for rehearing was filed by Mackay and it was granted.

The Court Refused to Abstain.

Mackay requested the Supreme Court of Alaska to abstain from decision until the Federal District Court made its decision (Appx. F, pp. 48-50). The opinion filed January 30, 1965, was the answer to the plea. It effectively deprived this petitioner of his right to have the federal district court decide federal and constitutional questions.

The Alaska Supreme Court should have abstained from decision until the federal district court decided questions of law, which this petitioner, as one of the plaintiffs, had chosen to present to the federal court. In *England v. Louisiana State Board of Medical Examiners* (1964), 375 U.S. 411, 415, 11 L. Ed. 2d 440, 445, this court said:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."

The Alaska Supreme Court should be ordered to vacate the decision of January 30, 1965, and to refrain from decision until the federal court determines the issues in the case now pending before it.

American Seating Co. (1943), 138 F. 2d 641; *Hagen v. Porter* (1946), 156 F. 2d 362.

2. Petitioner Has Been Deprived of Property Without Due Process of Law in That a Decision Was Made by a Biased Tribunal.

The rule of *England* requires a state court to abstain from decision if the litigant chooses a federal court to decide federal and constitutional questions. But the rule of abstention is also essential to due process. While the suit is pending in the federal district court, the justices of the Alaska Supreme Court are litigants. They hired counsel who pressed for a decision in their favor. Their right to act as they did has been challenged by this petitioner. The members of the Alaska Supreme Court not only have a "possible temptation" to act in their own favor, they have an actual bias in upholding their own rules. If a judge has an interest in a decision, due process of law requires his disqualification (*Tumey v. Ohio* (1926), 273 U.S. 510, 71 L. Ed. 749; *Re Murchison* (1954), 349 U.S. 133, 99 L. Ed. 942). Only a federal court can give an unbiased decision to petitioner on federal and constitutional questions involved in this litigation.

3. The Decision of the Supreme Court of Alaska Deprived This Petitioner of Due Process of Law and the Right to Equal Protection of the Laws.

(a) The Finding of Fact Is Based upon an Informal Record.

The Alaska court has announced that it does not agree with the findings of the board of governors which acquitted Mackay of the charges against him on December 1, 1961. But if the court chooses to differ with the findings of the board, its members should read the same record of evidence. This was not done. The

court has no record. The first opinion of the court belabored the board of governors for failure to transmit the record of evidence to the court and complained that the court was required to obtain an office copy of a transcript (Appx. A, p. 5). What kind of due process is this when a court accepts an "office copy" as evidence? If the court wished for a certified record, it should have demanded one from the board of governors or the trial committee. Unfortunately, there was no board of governors of the Alaska Bar Association in August 1964, when the court decided to revive charges against Mackay. The court had purported to remove the governors from office in July 1964.

The court then authorized its administrative officer to collect the information from any source available. It is this search which produced facts upon which the court relied to discipline Mackay. As a result, we have a serious departure from appellate procedure established in Alaska and every civilized system of courts. An appellate court reviews only a certified transcript of evidence taken at a formal hearing. If the transcript is obtained from and certified as correct by the trier of fact, all parties have an opportunity to check the record for truth and accuracy. Any other procedure leaves an accused helpless to protect himself from a mass of gossip. The Alaska court was in such a hurry to deliver its opinion before the federal district court could act that it failed to follow its own established rules and obtain a certified transcript from the trier of the facts. In effect, the Supreme Court of Alaska has attempted to take judicial notice of evidence taken before the hearing committee, assisted by stenographer's notes.

The petitioner had a right to inspect and if necessary correct the transcript of evidence taken before the trier of fact before that record was forwarded to the court. It is not his fault that the usual practice was not followed. Failure to permit inspection and correction of the record is an abuse of due process (*Chessman v. Teets* (1955), 350 U.S. 3, 100 L. Ed. 4). The established appellate procedure for a review of facts taken before a hearing committee is to review only a record certified by the hearing officers. A party accused is entitled to the benefit of established appellate procedures. A departure therefrom offends due process of law (*Frank v. Mangum* (1914), 237 U.S. 309, 59 L. Ed. 969; *Cole v. Arkansas* (1948), 333 U.S. 196, 92 L. Ed. 644).

The procedure also fails to give Mackay the same treatment which the court affords other Alaska lawyers in a similar position. The Alaska court would not dare adopt rules which gave it the right to review a hearing of charges against lawyers on an uncertified record. Yet in the Mackay matter, the court purports to accept and believe facts taken from the office copy of transcribed stenographer's notes. This fails to give Mackay the equal protection of the laws.

(b) The Petitioner Has a Right to Be Confronted With Witnesses.

If the Supreme Court of Alaska was unable to obtain a certified record of evidence taken at the hearing, the minimum of care would require that charges be again filed against the petitioner (unless such action is barred by the principle of collateral estoppel), and that he be confronted with witnesses and be permitted

cross-examination.[6] Petitioner to this day has not seen nor been able to inspect the so-called record of evidence. Decision of the court based on an unverified record of evidence deprived Mackay of the right of confrontation.

The right to be confronted by witnesses is indispensable to fair procedure in a state criminal case (*Pointer v. Texas* (April 1965), 379 U.S. ....; *Douglas v. Alabama* (April 1965), 379 U.S. ....). This reasoning is equally applicable to the proceedings against Mackay. He has been deprived of a valuable property right without being confronted by witnesses. The Alaska court cannot claim that the right of confrontation was afforded petitioner in the 1961 hearing because it has before it no record of evidence taken at that hearing which any one has checked for accuracy or certified as accurate.

Every lawyer subject to discipline in Alaska, either before or after June 1, 1964, has been afforded a hearing at which witnesses have been sworn. The hearing officer has certified to the correctness of that record subject to a check by the accused. Departure from this procedure in the matter of Mackay fails to give him equal protection of the laws.

(c) The Rules of the Supreme Court of Alaska Were Given Retroactive Effect.

The Supreme Court of Alaska insists it had the right to integrate the bar by court rules and to adopt its own rules for discipline of bar members. This is a question before the United States District Court for

[6]In this Petition for Rehearing, Petitioner advised the court that a hearing *"de novo"* would permit him to "overcome by competent evidence" the court's assertion of irregularities in procedure (Appx. p. 38).

Alaska and need not be discussed here. But it is conceded that prior to June 1, 1964, the disciplinary procedure for lawyers, outlined by statute and the rules of Alaska Integrated Bar, were exclusive. The court sat by and permitted this procedure. When Mackay was tried and acquitted by the finding of the board of governors in December 1961, the statute provided for no review of fact by the court. Decision of the board of governors was final except for ministerial act of an entry of dismissal in the court's record (§6 ch. 178 SLA 1960). But now in the matter of Mackay, the Supreme Court of Alaska pretends to act pursuant to Rule 9 of the Rules adopted June 1, 1964 (Appx. A, p. 6). As the Alaska court permitted charges against other lawyers to be processed by these statutory procedures, it is fundamentally unfair to Mackay to insist that his disciplinary matter be processed by the new rules. These rules necessarily must be prospective in order to afford this petitioner due process of law and equal protection of the law.

4. The Supreme Court of Alaska Is Collaterally Estopped to Revive Charges Against This Petitioner.

The Supreme Court of Alaska, acting as the agency of the state of Alaska, should be estopped to again initiate disciplinary proceedings against this petitioner. A duly authorized administrative agency of Alaska, the Alaska Bar Association, acting through its board of governors, has made a finding that the petitioner was

not guilty of the grievance charge. The revival of such charge, or the attempt to retry such charge, should be barred by the principles of collateral estoppel. Such procedure causes undue harassment; it is fundamentally unfair, and, therefore, deprives petitioner of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. It also fails to afford petitioner equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution. The court rules will not be used to revive charges against other lawyers.

In *Watkins v. Mississippi State Board of Pharmacy* (1934), 170 Miss. 26, 154 So. 277, plaintiff received a license as an assistant pharmacist. Later he sought a license as a pharmacist. The court held that the first license issued to the plaintiff established his good moral character and that the board was bound by the first finding when the plaintiff later applied for the second license.

In *Lilienthal v. City of Wyandotte* (1938), 286 Mich. 604, 282 N.W. 837, the plaintiff, a fireman, was required to answer charges before the police and fire commission. After a hearing, the charges were dismissed. At another hearing before the Civil Service Commission, charges of misconduct brought by the mayor on the same facts were sustained and the fireman was discharged. The court held that the dismissal of the charges against him at the first hearing was a bar to any further proceedings.

In *Bockman v. Arkansas State Medical Board* (1958), 229 Ark. 143, 313 S.W. 2d 826, previous findings of the state medical board were given finality in a second hearing.

Conclusion.

These are unusual facts. Important questions of law are involved which require this court's decision. We respectfully request that writ of certiorari issue to the Alaska Supreme Court.

Respectfully submitted,

JOSEPH A. BALL,
CLARK HEGGENESS,
EDGAR PAUL BOYKO,
ARTHUR D. TALBOT,
By JOSEPH A. BALL,
Attorneys for Petitioner.

EXHIBIT A.

Opinion.

The Supreme Court of the State of Alaska.

In the Matter of Disciplinary Proceedings Against Neil S. Mackay, an Attorney at Law. File No. ABA 8. [No. 257—October 26, 1964]

Appearances: Wendell P. Kay, Anchorage, for the Respondent. No attorney or appearance for the Alaska Bar Association.

Before: Nesbett, Chief Justice, Dimond and Arend, Justices.

Arend, Justice.

The Alaska Bar Association commenced this disciplinary proceeding in 1961 by filing a complaint against the respondent, Neil S. Mackay, charging him with misconduct in his office as an attorney and counselor at law and with violating his oath as an attorney and counselor by cheating or over-reaching a client. The complaint was later amended by the addition of two more charges, namely, purchase by the respondent of an interest in a suit of his client and lack of candor before the court. All charges were denied by the respondent.

The matter came on for hearing in September 1961 before a trial committee composed of three attorney members of the Alaska Bar Association, both parties being represented by counsel. After the hearing, which required several days for the taking of testimony and the argument of counsel, the majority, that

is, two members, of the trial committee made written report "that there were many elements brought out in the hearing which indicated deficiency in conduct on the part of the accused as over-reaching of the client." It was their recommendation that the respondent should be suspended "from the right to practice law in the state of Alaska for not more than six months as the Board of Governors feels appropriate."[1] The third mem-

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[1]With respect to the filing of complaints and the functions of the trial committee in disciplinary proceedings against attorneys at law, the Rules of Procedure Relative to Disbarment, promulgated by the Board of Governors pursuant to authority vested in it by section 8, chapter 196, SLA 1955 [Section 35-2-77h ACLA Cum. Supp. (1957)] provide as follows:

"Rule 7. PREPARATION AND FILING OF COMPLAINTS. If it shall appear to the President or other officer of the Board designated by the President, from report of the local grievance committee or otherwise, that grounds for reprimand, suspension or disbarment exist against any member or other attorney, such officer shall cause to be prepared and filed with the Secretary a complaint against the accused in the name of the Alaska Bar, and proceedings shall then be had thereon as hereafter provided. Such complaint shall be signed by the Secretary and shall set forth the acts or omissions of the accused so as to enable him to know the nature of the charges against him. Where more than one act or transaction is relied upon, the allegations shall be separately stated and numbered. The complaint need not be verified. Within the discretion of the Board, reprimand may be made by it without the filing of a formal complaint.

"Rule 8. TRIAL COMMITTEES. A trial committee, to be composed of three or more active members of the Alaska Bar, may be appointed by the President or other officer of the Board designated by the President for each city and vicinity mentioned. All cases of misconduct in which complaints are filed with the Secretary shall be tried by three or more members of the trial committee to be designated by the President or other officer of the Alaska Bar as may be designated by the President from time to time, one of whom shall be designated by the President to act as chairman of the particular trial committee so selected, provided that by resolution the Board may assign any such case to a special trial committee appointed by the Board. Members of the trial committee shall be selected for each case, and, whether chosen therefor by the President

ber of the committee wrote a dissenting report in which he stated that he found nothing in the respondent's conduct toward his client which called for any disciplinary action.

The minutes of the Board meeting of November 30 and December 1, 1961, deserve particular consideration and comment. As one of the last items of business on November 30, 1961, the Board unanimously voted to hear counsel for Mr. Mackay "informally as a courtesy extended by the Board."

The minutes reveal that the Board was called to order by the president at 9:30 a.m. Friday, December 1, 1961. Roll call showed eight members present, including the president. Council for Mr. Mackay appeared and spoke with respect to the grievance matter. Following the departure of counsel it was moved and seconded that the Board "sustain or concur in the dissenting

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or the Board, such selection shall be made for the sole purpose of giving the accused a fair and impartial trial and to insure justice to the public. A trial committee shall be appointed for each specific case. By vote of the Board, they or any of them, may be removed at any time and their successors appointed to serve. Members of the local grievance committee shall not sit as members of any trial committee concerning any case as to which such member or members may have made any investigation.

"Rule 9. DUTIES OF TRIAL COMMITTEES. It shall be the duty of trial committees to whom complaints have been referred promptly to settle the necessary pleadings in each case and try the same in the manner hereinafter provided. They shall pass on all questions of procedure and admission of evidence, and, in case of disagreement, the majority of the members of the trial committee shall decide each point or objection. They shall keep a record of all proceedings, including a transcript of the evidence and exhibits offered and received, and shall promptly transmit such record to the Board with their recommendations by forwarding the same to the Secretary. The recommendations to be made by the trial committee shall be by majority vote."

The Rules of Procedure from which the foregoing excerpts were taken were superseded on June 1, 1964, by "Rules of the Alaska Bar Association" promulgated by this court.

opinion of the Trial Committee."[2] The motion was declared carried. The recorded vote named four members who voted "yes" and two who voted "no." Unexplained in the minutes is the failure of the president to vote on the motion although he was present and chairman of the meeting. Also unexplained in the minutes is the fact that a member was permitted to abstain from voting on the motion.

A statute in effect at the time the trial committee and the Board acted in this matter provided in part:

> Upon finally determining any cause involving the discipline, disbarment, suspension or reinstatement of a member of the Alaska Bar, the Board of Governors *shall certify its findings and recommendations thereon to the Supreme Court of Alaska.* Upon receiving the findings and recommendations, the Court shall, within thirty days thereafter, issue an order of disbarment, suspension, reinstatement, dismissal or otherwise, in full accordance with the recommendations of the Board. . . . [Emphasis supplied.][3]

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[2]Rule 37 of the Rules of Procedure mentioned in note 1 above provided that

"The findings of a trial committee shall be reviewed by the Board [of Governors] upon (1) the record made and transmitted to the Secretary, (2) the statement, if any, in support of, or in opposition to, the recommendations of the trial committee, and (3) such additional evidence as may be received by the Board. Prompt decision upon such review shall be made by the Board and the Board's decision and recommendation shall be reported to the District Court for the District of Alaska and a copy thereof, as required by Section 14 of the Alaska Bar Act, notice thereof, shall be given to the accused."

[3]Section 35-2-77n ACLA Cum. Supp. (1957) as amended by SLA 1960, ch. 178, § 6.

The certification to the supreme court of the Board's findings and recommendations, as required by the above quoted statute, was never made. If this court had not had occasion only recently to remove the Board of Governors for refusal to comply with the court's rules and take temporary custody of the Association's records, it is doubtful if the court would ever have learned of this case.

We pause at this point to express disapproval of the failure of the president and another member of the Board to vote on the motion when it was their duty to do so. Only the most compelling of reasons could justify abstention under the circumstances and in such case the minutes should reflect the reason. Before abstaining the consent of a majority of the members present should have been obtained by a request and a formal vote on the request.

We are seriously concerned over the failure of the president and the members of the Board to certify or cause to be certified to the supreme court their findings and recommendation. Instead of certification as required by law, the Board apparently entered an order dismissing the complaint and destroyed all of the records of the case including the transcript of the trial proceedings.[4]

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[4]In response to verbal inquiry as to why certification was not made in this case, the former executive secretary advised that the entire record in this case was in the possession of the Board and that it was their obligation to certify, not his. Inquiry of the then president elicited the comment that he believed that, since the case was disposed of in favor of the accused, the records were all destroyed. The court succeeded in obtaining copies of the pleadings from a member of the trial committee and a transcript of the testimony from the court reporter.

We turn our attention next to that portion of the above quoted statute which states:

> Upon receiving the findings and recommendations, the Court shall, within thirty days thereafter, issue an order of disbarment, suspension, reinstatement, dismissal or otherwise, *in full accordance with the recommendations of the Board*. . . . [Emphasis ours.]

As of December 1961, when the Board should have certified its findings and recommendation to this court, the above statute was in force. We hold, however, that insofar as it attempted to impose upon the court the mandatory duty of issuing an order in full accordance with the recommendation of the Board, it was unconstitutional for being an invasion of the inherent power of the court to discipline and disbar members of the Alaska Bar Association.[5]

The above statute has been superseded by Rule 9, sections 13 and 14 of the Alaska Bar Rules, promulgated by this court effective June 1, 1964, which state:

> Section 13. Review. All reviews shall be on the record unless the Court, in its discretion, grants a hearing de novo, in whole or in part. Following review, the Court shall enter a final order disposing of the matter as it sees fit.

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[5]See *In re* Sullivan, 64 Ariz. 337, 170 P.2d 614, 615 (1946); *In re* Accusation by Walker, 32 Cal. 2d 488, 196 P. 2d 882 (1948); Martin v. Davis, 187 Kan. 473, 357 P. 2d 782, 787-88 (1960), *appeal on other point dismissed sub nom.* Martin v. Walton, 368 U.S. 25, 7 L.ed.2d 5 (1961); *In re* Farris, 229 Ore. 209, 367 P.2d 387, 397 (1961); Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325, 330, 144 A.L.R. 839 (1943).

> Section 14. Procedure When Uncontested. If no petition for review is made within the time limited, the Court may issue an order of dismissal, reprimand, disbarment, suspension, or order review on its own motion, as it sees fit.

The case was not processed and moved along by the Board with the promptness it deserved as a disciplinary proceeding. This is evidenced in the following paragraphs contained in a letter written in connection with this case by the chairman of the trial committee to the president of the Board:

> I would be less than honorable in this situation if I did not at this time call to your attention several points of concern that have rather plagued the writer as a committee member throughout the course of this proceeding.
>
> . . .The delay in bringing this matter to hearing is almost unconscionable and while some of it may be the fault of the chairman of the committee, certainly the hearing was long delayed by virtue of failure to constitute a trial committee. This matter should have been gotten out of the way during the year of 1960 and accordingly is at least one year late of what it should have been. This I think is inexcusable regardless of whose fault it is.
>
> . . .
>
> It appears to me further that the filing of the pleadings in this case was most haphazard. I would call your attention to the fact that we do not have all of the original pleadings. The original complaint is not in the file and we used a copy

thereof. The items in the file when we received it, were not date stamped as to receipt and the whole aspect of filing seemed most casual.

It appears to me that after the trial committee was appointed that there was no follow-up on the part of the Board of Governors. I would appreciate the fact that the Board of Governors did not find fit to concern themselves or to inquire as to the timing of the proceedings, leaving it entirely in the hands of the chairman of the trial committee, if such was intended as an expression of confidence.

I am reasonably certain that there was no expression of confidence by this failure to inquire or to follow the pleadings and I can assure the Board that if the same procedure is followed in the future you will have continued bad results. If we know anything we know there is an occupational disease of lawyers that distasteful matters are placed to one side, put off to another day and that is exactly what you can expect in situations of this kind. It would be my recommendation that the secretary upon the receipt of a file of this kind, set up a regular schedule to be followed by the trial committee and that a report be regularly made to the President so that the President of the Board will at all times know the timing and the stages of the proceedings of any disciplinary matter and a rule should be established that each and every one of them must be completed within a given time unless leave is granted for an enlargement of time from the Board.

Though not required to do so because of this court's inherent power to discipline members of the bar,[6] we may have felt constrained to adopt the recommendations of the Board if the trial committee had reached a unanimous conclusion that disciplinary action was not called for and the Board had then unanimously affirmed that decision. Instead, there was no unanimity in the recommendation of the six members of the Board who voted and the decision they affirmed was not even that reached by the majority of the trial committee. In such a situation we feel it incumbent upon us to most carefully examine the law and the facts pertaining to the complaint against the respondent and to exercise our independent judgment in the matter. To do this we are in no less favorable position than was the Board of Governors, since it reviewed the case solely on the record as we shall likewise do.

Before proceeding with our review on the merits, we need to rule upon two motions filed in this court by the respondent. The first motion was filed on September 24, 1964, the same day on which the respondent and his attorney appeared personally before the court and the attorney made oral argument on behalf

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[6]See *In re* Paul, 17 Alaska 360, 366-68 (D. Alaska 1957); *In re* Tribble, 94 Ariz. 129, 382 P.2d 237 (1963); *In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768, 774-75 (1954); *In re* Cox, 164 Kan. 160, 188 P.2d 652, 655 (1948); *In re* Platz, 60 Nev. 296, 108 P.2d 858, 861 (1940); *In re* Farris, 229 Ore. 209, 367 P.2d 387, 392, 397 (1961); *In re* Olson, 116 Wash. 186, 198 Pac. 742 (1921), holding that the supreme court may, at its own option, examine into charges against an attorney proceeded against by the state board of bar examiners, even though the board has not recommended that his license be revoked or annulled, the court having inherent power to admit, suspend or disbar attorneys at law and notwithstanding statutory provision giving an attorney whose license has been revoked the right to petition the supreme court to review the board's findings.

of the respondent. The motion was to dismiss the pending review of the disciplinary proceeding involving the respondent and was made on grounds of res adjudicata, double jeopardy and absence of a complete record upon which to base a fair and adequate review.

The second motion, designated "Supplemental Motion to Dismiss" was filed on October 9, 1964. It is based on claims of res adjudicata, laches or "stale mate," failure to bring the matter properly before this court and to advise the respondent of the charges against him and of the basis upon which the court is proceeding, lack of jurisdiction in the court, no right in this court to review anything but the limited record upon which the minority of the trial committee found that the proceeding should be dismissed, and denial to the defendant of due process of law as prescribed in the state and federal constitutions.

The respondent was granted time until October 19, 1964, to file a memorandum or brief in support of his motions. The memorandum has been received and considered. We find no merit in the motions or in the reasons given in support thereof. Both motions are therefore denied and it is so ordered.

The facts leading up to the filing of the complaint against the respondent were as follows:

After completing law school in 1951 in California the respondent came to Anchorage, Alaska, where he went to work in the First National Bank and became a vice president in charge of loans. By virtue of his office he had numerous business contacts with one Mary Hill who with her husband, John Hill, had substantial cash deposits in the bank. It is to be noted that

Mary Hill was a Finnish woman, sixty-eight years of age in 1957, who had no schooling, a very limited knowledge and use of the English language and not much business intelligence. The respondent described her as a spendthrift in the most exaggerated sense of the word and ventured to say that she would have signed anything he asked her to sign and that, if a Finn or anyone whom she knew quite well needed some money, she would give it to him.

Mary often co-signed promissory notes for persons borrowing money from the bank. On occasions when the bank notified her that payments on a note were delinquent and she volunteered to pay off the note, the respondent would assist her to force payment from the principal debtor. Eventually he persuaded her to stop co-signing notes. During the first several years of his acquaintanceship with Mary, the respondent observed that she and her husband, John Hill, completely dissipated a cash fund of $80,000.

The respondent was admitted to the practice of law in Alaska in March of 1955, after passing the bar examination here. In the meantime he had terminated his employment at the bank and gone into the undertaking business, combining this with some law practice after his admission to the bar. It appears that the respondent as a mortician conducted the funeral arrangements for Mr. Hill and thereafter acted as Mary's attorney until some time in 1960.

Among Mary's assets after the death of John Hill were two city lots with the improvements thereon located at Fifth Avenue and Gambell Street, adjacent to the Westward Inn and other business properties. The

improvements consisted of several substandard rental units occupied for the most part by Mary's Finnish friends, some of whom were not paying their rent.

To digress for a moment, in 1956, after John Hill's death, Mary and another Finn, Herman Keno, whom she had known since 1940, obtained a license at Seward to marry; however, the marriage did not materialize until March of the following year. The respondent regarded this man as a very unpredictable person from about the first time he met him. Seven or eight times he had to bail Herman out of jail and pay his fine.

It seems to have become apparent to Mary quite soon after Mr. Hill's death that the operation of the Gambell Street property was not a profitable business for her because she was having trouble in collecting rent from the tenants and in paying the utility bills, taxes and costs of maintenance and repairs. Besides, she and Herman wanted to leave Anchorage and reside at Anchor Point. So Mary asked the respondent to sell the Gambell Street property for her. This he tried to do but without success. After Mary and Herman had made many calls at the respondent's office to inquire whether a buyer had been found, it was finally arranged that the respondent and his wife would purchase the property from Mary for $1,000 plus playments of $150 per month during the remainder of her natural life. The respondent testified that the idea for the sale and its terms originated with Mary. There is no clear evidence to the contrary in the testimony of either Mary or Herman. In fact they both testified that they understood the deal and considered it a good one for Mary.

In regard to the value of the property, Mary and Herman felt that it was worth $40,000, but the re-

spondent stated that he was unable to find a buyer at that price or at any price. Exactly what efforts were made by the respondent to push the sale of the property we are unable to determine from the record other than that he discussed the property with certain individuals who, he thought, might be interested in buying it, and he also listed it with a real estate firm. The respondent testified that he figured the property to be worth about $15,000; however, he did bind himself to pay for it some $31,000 in the event Mary lived out her life expectancy, according to the calculations given to the trial committee by his attorney. In 1958 the City of Anchorage gave the property an assessment value of $29,400, of which amount $17,450 was assigned to the land and the balance to the improvements. The respondent considered the evaluation placed on the improvements as being too high but he did not make any formal protest to the City.

The transaction was embodied in a formal written contract, along with deeds from Mary and Herman to the respondent and his wife, under date of January 9, 1957. The conveyance from Herman was in the form of a quitclaim deed and was obtained by the respondent to safeguard against any marital claims that Herman might have to the property. The respondent took Mary and Herman to the office of another attorney, Albert Maffei, before whom the subject documents were executed and acknowledged.

The respondent testified that Maffei was brought into the picture as independent legal counsel for Mary and Herman. Maffei testified that he was not hired or paid by the Kenos (Mary and Herman) to act as their at-

torney on this occasion. His function, as he understood it:

> was merely to act as a person that would—an independent person that would explain to these individuals the nature of these—not the nature of these documents, but the substance of them. In other words, I was to read it over with them so that they would know what they were signing. I think mainly I was to act as the notary.

The record does not establish that Maffei acted as independent legal counsel for Mary in this transaction.

The written agreement between Mary and the Mackays contained two patent irregularities. It bore no legal description of the property to be transferred, referring to it merely as "one full lot and one-half lot" in the Anchorage Recording Precinct, and it had this unusual penultimate paragraph:

> That should the parties of the first part [the Mackays] predecease the party of the second part [Mary Hill Keno], said heirs or assigns of the parties of the first part *shall have the right to fulfill and carry out this agreement* pursuant to the terms hereinabove set forth. [Emphasis supplied.]

If Mr. Maffei had been acting as counsel for Mary, it is reasonable to assume that he would have raised some question about these irregularities present in the document. Instead, he testified quite definitely that he did not advise her regarding either of these matters; nor did he discuss mortality tables with her or ascertain the wisdom of having her sign the agreement. This seems to us to be consistent with his statement that he was not her attorney.

After the transfer of the property, Mary received her payments of $150 per month regularly from the respondent, frequently drawing them in advance herself or by Herman. In June of 1958 without any apparent effort on his part, the respondent sold the property to the Alaska National Bank for $25,000 cash, with a net sales return of $23,000 or $24,000.

At this point we note that Mackay was acting as attorney for Mary in foreclosing a real mortgage given by Arne Murto to Mary and her former husband, John Hill, to secure a note in the principal sum of $3,400. The full principal was in arrears, plus accrued interest. The First National Bank, by whom the respondent had earlier been employed, also had a mortgage on the property described in the mortgage held by the Hills. The bank's mortgage, though prior in time, had not been recorded in the recording office until after Hills had recorded their mortgage. There was some sort of understanding between the respondent and counsel for the bank that the bank would try to satisfy its claim against Murto first out of some other Murto property as to which it was the mortgagee, failing this, any losses sustained would be shared by Mary and the bank in proportion to the amount of principal and interest owed to each.

By 1959 it appears that Herman was exerting considerable force and effect upon the affairs of Mary. According to Mary's testimony, Herman wanted to cash out with the Mackays the agreement of January 9, 1957, so that he and Mary could go to Finland to live. Mary was opposed to the idea. The respondent corroborates Mary to the extent of saying that it was Herman who actually wanted a cash settlement of the agreement, but

he insisted that he tried to dissuade Mary from surrendering her agreement. Finally, one day Mary and Herman came together to the respondent's office, so he testified, and said they wanted the cash settlement and that for $10,000 they would surrender the agreement of 1957 and throw in the Murto mortgage to boot.

Some time prior to these negotiations for a cash settlement, the respondent began having "problems with the Grievance Committee," as he put it, because someone had filed a complaint against him concerning the transaction of January 9, 1957. Just what effect that had upon the respondent's next move is uncertain but he did testify:

> Mary to this date, denies that she signed the complaint [with the grievance committee]. And of course, she probably signed a complaint, so therefore, I was rather dubious about the whole transaction, relative to who was doing what to whom. So when both of them came into my office and wanted $10,000, I went out and borrowed the money and gave it to them.

To formalize this cash settlement, the respondent followed practically the same procedure as in the 1957 transaction. He executed or caused to be executed a "Release of All Claims" by Mary and Herman of the 1957 annuity agreement for a lump sum settlement of $10,000 and an assignment by Mary to himself of the Murto note and mortgage. He then took Mary again before Mr. Maffei, ostensibly for the purpose of providing her with independent counsel in the matter. By this time he seems to have been associated with Mr. Maffei in real estate transactions and by some unexplained coincidence the release and the assignment appear on Maf-

fei's stationery as an attorney at law. Maffei stated that the documents could have been prepared either in his office "or they could possibly have been dictated to someone in Neil's office." He maintained, however, that he acted in the same capacity on this occasion as he had in 1957—as a notary public in ascertaining that Mary and Herman knew what they were signing and then taking their acknowledgements. He received no compensation for his services either from Mary or the respondent.

It is the testimony of the respondent that he did not suggest that the Murto note and mortgage be made a part of the consideration for the $10,000 cash payment to Mary; nevertheless, the note and mortgage were incorporated in the release transaction. The respondent subsequently assigned his interest in the note and mortgage to one Martin, a very good friend and client of his, for $2,000. Martin testified that the respondent stated to him at the time that he, Martin, would be able to double his money "over an extended period of time, if everything went as it looked like it should."

At this point we have a situation in which the respondent, if we use his own figures, has made a net gain of $5,500[7] from his dealings with his client Mary

[7]From the sale price of $25,000 which the respondent received for the Gambell Street property, he credits himself for the following deductions: $1,000 paid to Mary in cash on January 9, 1957; $4,950 paid to Mary in thirty-three monthly sums of $150 between January 9, 1957, and November 3, 1959; $10,000 paid to Mary in cash on November 3, 1959; $1,500 as net loss from operation of the property by the Mackays between January 9, 1957, and the date of the sale of the property to the Alaska National Bank in 1958; and $2,000 for expenses of the sale; or a total of $19,450. The difference between the deductions claimed, roughly $19,500, and the $25,000 received from the sale is $5,500.

Hill Keno over her Gambell Street property. In addition to that he has received $2,000 from his assignment of the Murto note and mortgage, which he told the assignee might well be worth $4,000 in time. Thus, from all of his dealings with Mary and her property, the respondent has enriched himself in the amount of at least $7,500 over a period of less than three years, not to mention the legal fees he had received for services performed as an attorney at law for Mary and Herman.

Considering the evidence in this case as a whole and viewing in their entirety all of the acts of the respondent in relation to his client Mary Hill Keno, we are persuaded to agree with the majority of the trial committee that Mary had been over-reached, to use the milder expression, by the man on whom she relied for guidance and direction.

The respondent stated himself that Mary came to him because she relied upon him. Yet when Herman came to him with the offer to sell Mary's lifetime security for $10,000, and Mary later joined in the offer, the respondent took no firm stand against separating his client from "the protective devices he claimed to have initiated for her benefit," to use some of the language employed in the majority report of the trial committee. Even if we were to believe his testimony, as against that of Mr. Maffei, that he sent her to Maffei for independent legal advice,[8] it could have been only a token

[8]It is difficult to determine from the respondent's testimony whether he sent Mary to Mr. Maffei for independent legal ad-

gesture, for neither he nor Mr. Maffei informed Mary that the respondent would be netting $5,500 for himself through this 1959 deal by virtue of his 1958 sale of the Gambell Street property to the Alaska National Bank. We cannot understand why under the circumstances he did not at least say to Mary: "You don't have to throw in the Murto note and mortgage, and I won't take them, because you have been more than generous in making it possible for me to already clear $5,500 on this deal," or words to that effect.

In strange contrast to the respondent's statement on the witness stand that he "felt very bad about the way she [Mary] broke down here the other day" and that he "would be more than happy to continue that $150 a month," is the fact that he had done nothing to make things right with Mary and apparently feels that he has done nothing unbecoming an attorney and one standing in the highly fiduciary relationship in which he stood with respect to his client.

We are of the firm opinion that the respondent, Neil S. Mackay, has manifested by his conduct in his dealings with his client, Mary Hill Keno, complete lack of comprehension or appreciation of the duties and responsibilities resting upon one in his position and as a member of the legal profession. We find him unfit to con-

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vice. At one time in his testimony he said that was his intention and at another time, when asked how he could justify taking away from her the agreement by which she was receiving $150 per month, he answered: "Because that is what she wanted, and I talked her out of it, I don't know how many times. . . ."

EXHIBIT B.

Opinion.

The Supreme Court of the State of Alaska.

In the matter of Disciplinary Proceedings Against Neil S. Mackay, an Attorney at Law. File No. ABA 8 [No. 278 — January 30, 1965]

Appearances: Wendell P. Kay, and Arthur D. Talbot, Anchorage, for the Respondent. No attorney or appearance for the Alaska Bar Association.

Before: Nesbett, Chief Justice, Dimond and Arend, Justices.

On Petition for Rehearing

Arend, Justice.

Neil S. Mackay, respondent in the above entitled disciplinary proceeding wherein he was disbarred from the practice of law by this court, has petitioned for a rehearing on nine separate grounds. The respondent's brief does not deal with these grounds in any detail and ignores some of them entirely. However, we shall discuss the six grounds which we deem to have sufficient merit to warrant our consideration. These are set forth in the margin, in paraphrase but under the numbers used by the respondent.[1] We shall commence

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[1]The following six out of the nine grounds stated by the respondent in support of his petition for rehearing are considered by the court in this opinion:

1. The court misconceived its authority in assuming jurisdiction to act in an attorney disciplinary matter which has been reserved by statute to the administrative tribunals of the Alaska Bar Association.

2. The court has overlooked the fact that it is objectively disqualified to give the respondent a fair and impartial hearing, inasmuch as there is presently pending a controversy between this

with grounds numbered one, five and seven; and, since they are more or less related in that they all challenge the jurisdiction of this court to act in the matter, we shall consider them together.

The substance of the respondent's argument on the issue of jurisdiction is that the law applicable to this proceeding and in effect in 1961 when the trial committee and the Board of Governors of the Alaska Bar Association acted in this matter, which culminated in the exoneration of the respondent by the Board, was the Alaska Integrated Bar Act of 1955[2] and the Rules promulgated thereunder by the Board. The respondent contends that under that act only the trial committee and the Board of Governors had jurisdiction to prose-

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court and the Alaska Bar Association (of which the respondent is a member and of which controversy he is a party litigant) in the federal district court over the question of whether this court has the authority to establish the procedure for and conclude disciplinary proceedings against an attorney.

5. The court has exceeded its jurisdiction in that it is a court of appellate jurisdiction and without any original jurisdiction to hear an attorney disciplinary proceeding.

7. In holding that the rules promulgated for the Alaska Bar Association by this court, effective June 1, 1964, superseded the Alaska Integrated Bar Act of 1955 (SLA 1955, ch. 196), as preserved by section 8(d) of the Alaska Statehood Act (72 Stat. 339), the court has erroneously assumed the power to enlarge its own jurisdiction so as to include a right to prosecute respondent for an alleged offense of which he had been duly acquitted three years previously by the Board of Governors of the Alaska Bar Association, the only appropriate tribunal of competent jurisdiction.

8. The court has overlooked the circumstance that in retrying the respondent on a charge of which he had been earlier tried and exonerated it had subjected him to double jeopardy and violated the doctrine of res judicata.

9. The penalty of disbarment meted out to the respondent by the court was too severe under the circumstances of the case.

[2]SLA 1955, ch. 196 [§§ 35-2-77a through 35-2-77o ACLA Cum. Supp. (1957), now AS 08.08].

cute him for the alleged offense of misconduct as an attorney, and that the Board's decision in the matter was final. He apparently bases his contention upon those provisions of the 1955 act which declare that the Board of Governors shall have the power

> to investigate, prosecute, hear and finally determine all causes involving discipline, disbarment, suspension or reinstatement; and to prescribe rules establishing the procedure for the investigation and hearing of such matters, and establishing divisional or municipal agencies to assist therein to the extent provided by such rules. . . .[3]

and that

> Upon finally determining any cause involving the discipline, disbarment, suspension or reinstatement of a member of the Alaska Bar, the Board of Governors shall certify its findings and recommendations thereon to the Supreme Court of Alaska. Upon receiving the findings and recommendations, the Court shall, within thirty days thereafter, issue an order of disbarment, suspension, reinstatement, dismissal, or otherwise, in full accordance with the recommendations of the Board of Governors, unless the accused member shall sooner petition the Court for review. . . .[4]

It is the further contention of the respondent that the Alaska Integrated Bar Act of 1955 continues in full force and effect down to the present time by virtue

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[3]SLA 1955, ch. 196, § 8 [§ 35-2-77h ACLA Cum. Supp. (1957), now AS 08.08.110(4)].

[4]SLA 1955, ch. 196, § 14, as amended by SLA 1960, ch. 178, § 6 [now AS 08.08.220].

of section 8(d) of the Alaska Statehood Act of 1958 (72 Stat. 339, 344), which reads:

> Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. . . .

Upon the premise that the bar Act of 1955 is still in full force and effect by virtue of the foregoing provision of the Alaska Statehood Act, the respondent concludes that he is entitled to be tried and adjudged for alleged misconduct under the provision of the Bar Act alone, and that this court has no jurisdiction in the matter except at the appellate level and then only if the respondent had seen fit to ask for review.[5] To hold otherwise, says the respondent, would be to deprive him of his right to due process of law and equal protection of the laws under the fourteenth amendment of the Constitution of the United States[6] and Article I of the Alaska Constitution.[7]

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[5]It stands to reason that the respondent would not have sought review by the court in this case, since the majority of the Board of Governors had voted to concur in the minority report of the trial committee that the respondent's conduct did not call for any disciplinary action.

[6]"[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendments to the Constitution, Art. XIV, § 1.

[7]Excerpts from Article I of the Alaska Constitution:

"Section 1. This constitution is dedicated to the principles . . . that all persons are equal and entitled to equal rights, opportunities and protection under the law. . . ."

We cannot assent to the respondent's view, for to do so we would have to deny the inherent power of this court over the suspension and disbarment of the attorneys.[8] The power of the courts to suspend or disbar has long been recognized in other jurisdictions.[9] It cannot be defeated by the legislative branch of government.[10] We accept the doctrine that an appellate court has such inherent power[11] and that it may exercise the power on its own motion.[12]

The exercise by this court in the instant case of the power to discipline the respondent is in keeping with the foregoing legal principles and it does not contravene any of the provisions of either the federal or state con-

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"Section 7. No person shall be deprived of life, liberty, or property, without due process of law. . . ."

[8]For only a few of the many cases recognizing the inherent power of the courts to discipline attorneys, see Phipps v. Wilson, 186 F.2d 748, 751 (7th Cir. 1951); *In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768, 775 (1954); *In re* Trask, 46 Hawaii 404, 380 P.2d 751, 758 (1963); *In re* Watson, 71 Nev. 227, 286 P.2d 254, 53 A.L.R.2d 301 (1955); *In re* Bruen, 102 Wash. 472, 172 Pac. 1152, 1154 (1918).

[9]People *ex rel.* Colorado Bar Ass'n v. Irwin, 60 Colo. 177, 152 Pac. 905, 908 (1915); Application of Harper, 84 So. 2d 700, 706, 54 A.L.R.2d 1272 (Fla 1956); *In re* Richards, 333 Mo. 907, 63 S.W.2d 672, 674 (1933); *In re* Bruen, *supra* note 8.

[10]*In re* Lavine, 2 Cal. 2d 324, 41 P.2d 161, 162, *modified on another point*, 2 Cal. 2d 324, 42 P.2d 311 (1935); De Karsner v. Boykin, 54 Ga. App. 29, 186 S.E. 701, 703-04 (1936); State *ex rel.* Clark v. Shain, 343 Mo. 542, 122 S.W.2d 882 (1938); Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325, 330, 144 A.L.R. 839 (1943).

[11]Commonwealth *ex rel.* Ward v. Harrington, 266 Ky. 41, 98 S.W.2d 53, 57 (1936); *In re* Pate, 107 S.W.2d 157, 159, 162 (Mo. Ct. App. 1937).

[12]*In re* Hallinan, 43 Cal. 2d 243, 272 P.2d 768, 775 (1954); *In re* Association of Bar, 222 App. Div. 580, 227 N.Y.S. 1, 8-10 (1928).

stitution.[13] We do not agree with the respondent's contention that there should be read into section 8(d) of the Alaska Statehood Act an intent to limit the powers of the Supreme Court of Alaska. We are convinced that any attempt by Congress to limit the power of this court, as the respondent contends, would be invalid. The Supreme Court of the United States has stated clearly on several occasions that states are admitted into the Union on an equal footing with respect to power, dignity and authority.[14] Applying that principle to the case under consideration, we hold that Congress cannot limit this court's power to discipline Alaskan lawyers either directly or by continuing in force the provision of a territorial statute claimed by the respondent to have that effect.

As to the respondent's assertion that this court is objectively disqualified to give him a fair and impartial hearing because it is biased or prejudiced against him on account of his participation in the pending federal court case mentioned earlier, we disclaim any such hostile feeling or spirit of ill will towards the respondent as would render us unfit to judge his case.[15] The fact that we may have an opinion as to the merits of the case or how it should be decided different from that

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[13]See Saier v. State Bar, 293 F.2d 756, 759-60 (6th Cir.), *cert. denied,* 368 U.S. 947, 7 L.ed.2d 343 (1961); *In re* Cloud, 217 Iowa 3, 250 N.W. 160, 163 (1933).

[14]Skiriotes v. Florida, 313 U.S. 69, 77, 85 L.ed. 1193, 1200 (1941); Coyle v. Smith, 221 U.S. 559, 572, 55 L.ed. 853, 860 (1911); Pollard v. Hagan, 44 U.S. (3 How.) 212, 228-29, 11 L.ed. 565, 573 (1845).

[15]Bias or prejudice sufficient to disqualify a judge is said to be "a prejudice that is directed against the party litigant, and is of such a nature and character as would render it improbable that the party could have a fair and impartial trial in the particular case pending." Bell v. Bell, 18 Idaho 636, 111 Pac. 1074 (1910).

of the respondent is not enough to make us biased or prejudiced.[16]

A second matter which we have to take into consideration is the fact that there is no other court, either state or federal, which has jurisdiction to review the administrative action of the trial committee and Board of Governors in this proceeding.[17] Under such circumstances we deem it our duty to act.[18] Should the respondent still feel that our investigation of his conduct and our decision in this case was arbitrary, irrational or discriminatory, and offensive to the fourteenth amendment, there is nothing to prevent him from seeking a writ of certiorari in the Supreme Court of the United States.[19]

The respondent's claim that this court has subjected him to double jeopardy and violated the doctrine of res

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[16]See State *ex rel.* Mitchell v. Sage Stores Co., 157 Kan. 622, 143 P.2d 652, 654-56 (1943), *affirmed on another point,* 323 U.S. 32, 89 L.ed. 25 (1944); Haslam v. Morrison, 113 Utah 14, 190 P.2d 520, 523 (1948).

[17]See Theard v. United States, 354 U.S. 278, 281, 1 L.ed. 2d 1342, 1344 (1957); Green v. Elbert, 63 Fed. 308 (8th Cir. 1894).

[18]See State *ex rel.* Mitchell v. Sage Stores Co., 157 Kan. 622, 143 P.2d 652, 656-57 (1943), *affirmed on another point,* 323 U.S. 32, 89 L.ed. 25 (1944); Brinkley v. Hassig, 83 F.2d 351 (10th Cir. 1936), wherein the court held that the fact of disqualification may be overcome in the appropriate case under the doctrine of necessity, stating at 357:
"If the law provides for a substitution of personnel on a . . . court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification. . . ."

[19]Cohen v. Hurley, 366 U.S. 117, 122-24, 6 L.ed.2d 156, 161-62 (1961); Konigsberg v. State Bar, 366 U.S. 36, 44-45, 6 L.ed.2d 105, 113 (1961); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 248-49, 1 L.ed.2d 796, 801-02, 807 (1957).

judicata in that it has retried him on a charge of which he had been earlier tried and exonerated overlooks two basic principles. In the first place, jeopardy in either its constitutional or its common law sense, has a strict application to criminal prosecutions only.[20] A disciplinary proceeding such as we have in this case is not criminal in nature, but is sui generis, being an exercise of the inherent power and jurisdiction of this court over attorneys as officers of the court.[21]

Secondly, before the respondent can lay claim to a violation of the doctrine of res judicata in his case, he must show that the action of the Board of Governors, in voting to concur in the minority report of the trial committee that the respondent's conduct did not call for any disciplinary action, constituted a final judgment in the proceeding.[22] That he cannot do, for a statute on the books at the time the Board of Governors cast its vote required that "upon receiving the findings and recommendations, the [Supreme] Court shall . . . issue an order of disbarment, suspension, reinstatement, dismissal, or otherwise, in full accordance with the recommendations of the Board of Governors. . . ."[23] Under that statute it is the order of this court which constitutes

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[20]People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953); Rupert v. State, 9 Okla. Crim. 226, 131 Pac. 713, 714 (1913).

[21]*In re* Sparrow, 338 Mo. 203, 90 S.W.2d 401, 404 (1935); *In re* Ries, 131 N.J.L. 559, 37 A.2d 417 (1944).

[22]"The rule of res judicata is that a final judgment or decree on the merits by a court of competent jurisdiction is conclusive of the rights of the parties or their privies in all later suits on the points and matters determined in the former suit." American S. S. Co. v. Wickwire Spencer Steel Co., 8 F. Supp. 562, 566 (S.D.N.Y. 1934).

[23]SLA 1955, ch 196, § 14, as amended by SLA 1960, ch. 178, § 6 [now AS 08.08.220].

that the president not vote except to break a tie. Under these circumstances, the president and Board member involved are not deserving of any censure or blame for their failure to vote.

This brings us to the respondent's argument that the penalty of disbarment was too severe in his case.

In assessing the penalty of disbarment, we were influenced by the fact that the respondent, by his own figures, had enriched himself in the amount of $7,500 at the expense of his client, Mary Hill Keno, and by the fact that the transcript reflected that he felt that he had done nothing unbecoming an attorney and had no apparent intention of making things right with Mary by offering to restore to her the profit which he wrongfully realized at her expense.

As noted in footnote 9 to our original opinion, we were guided to some extent by the decision in *In re Park*[26] where the respondent attorney had commingled funds and had used small amounts of money belonging to his client, but with the intention of replacing the funds. The Board of Governors had recommended a ninety-day suspension but the court ordered disbarment. In another disciplinary proceeding—*In re Fagan*[27]—the attorney involved had failed to apply $1,680.96 to the discharge of a real estate lien after he had been

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vides: "PARLIAMENTARY RULES. Proceedings at any meeting of the Alaska Bar shall be governed by Robert's 'Rules of Order.'"

[26]45 Wash. 2d 383, 274 P.2d 1006 (1954).

[27]42 N.J. 513, 201 A.2d 711 (1964).

entrusted to do so and had not made restitution or offered to do so. Disbarment was ordered.

In contrast with the respondent's previous attitude toward the offense, we are now advised by him in his petition for rehearing that

> The reason petitioner [respondent] has, in the words of the Court, "done nothing to make things right with Mary" . . . is that respondent was advised by his counsel and informed by the decision of the Board of Governors to the effect that respondent was not guilty of wronging Mary Keno. Petitioner unequivocally states and represents to this Court, however, that he has absolutely no desire to retain any profit or monetary advantage in any way connected with any of respondent's dealings with his client, if such dealings are, in law or in fact, improper, unethical or morally wrong.

In view of the respondent's apparent willingness to make restitution and the flexibility permitted by an order of suspension with a condition attached to applying for reinstatement, we are now convinced that more good can be accomplished by setting the order of disbarment, ordering respondent's suspension from the practice of law for a period of one year and until reinstated, and further ordering that respondent's reinstatement at the termination of the suspension shall be conditional upon his showing that he has paid to Mary Hill Keno, or her heirs, executors or administrators,

or the State of Alaska, if appropriate,[28] the sum of $7,500[29] within three months after the date of the publication of this opinion, and it is

So Ordered.

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[28]The basis for our mention of the State of Alaska as a possible recipient of the $7,500 is the following letter which we received from the Attorney General of Alaska and which constituted our first awareness of the unusual disposition made of the respondent's case by the Board of Governors:

"August 6, 1964

"Mr. Ernest Rehbock
Trustee for the Alaska
Bar Association
941 Fourth Avenue
Anchorage, Alaska

"Re: Mary Hill Keno

"Dear Mr. Rehbock:

"We are presently attempting to obtain satisfaction of the State of Alaska's claim against Mary Hill Keno. Mrs. Keno is presently a recipient of state aid. Over six thousand dollars ($6,000) in assistance has already been granted her.

"Our investigation in this case indicates that the attorney who represented Mrs. Keno on matters involving her property may have taken advantage of his relationship with Mrs. Keno and may have defrauded her of an unknown amount of property. Mrs. Keno is known to have been wealthy at one time. Our investigation discloses that the attorney involved was prosecuted by the Alaska Bar Association in 1959 for his actions in connection with the property of Mrs. Keno.

"We would like to obtain the records of the proceedings before the Alaska Bar Association in order to determine whether the state may have an action to set aside a fraudulent conveyance of Mrs. Keno's property. Our files indicate that Mr. Neil Mackay was Mrs. Keno's attorney in this case.

. . . .

"Very truly yours,
WARREN C. COLVER
ATTORNEY GENERAL. . . ."

The figure of "over six thousand dollars" mentioned in the letter of the Attorney General may have increased considerably by additional state aid given to Mary since August 6, 1964.

[29]We arrived at the repayment figure of $7,500 required of the respondent by using his admitted net gain of $5,500 from his dealings with Mary over her Gambell Street property and by adding thereto the $2,000 which he received from the sale of the Murto note and mortgage.

EXHIBIT C.

Order.

The Supreme Court of the State of Alaska.

In the Matter of Disciplinary Proceedings Against Neil S. Mackay, an Attorney at Law. File No. ABA 8.

In accordance with the opinion on rehearing filed January 30, 1965,

It Is ORDERED:

1. Neil S. Mackay is suspended from practice as an attorney and counselor at law in the State of Alaska for a period of one year and until reinstated. The period of suspension shall commence March 8, 1965.

2. Reinstatement at the termination of the period of suspension is conditional upon Neil S. Mackay showing that he has paid to Mary Hill Keno, or her heirs, executors or administrators or the State of Alaska, if appropriate, the sum of $7,500 within three months after January 30, 1965.

3. The order of disbarment dated October 26, 1964, and that portion of the order of November 5, 1964 staying the order of disbarment, are vacated.

Dated: February 8, 1965.

Bruce A. Nesbett
Chief Justice
John H. Dimond
Associate Justice

Distribution:

Neil S. Mackay
Supreme Court Justices
Superior Court Judges
Chief Judge, Court of Appeals
for the Ninth Circuit
U.S. District Court Judges
Alaska Bar Association
Clerks of Court
District Magistrates
Fairbanks, Anchorage, Juneau and Ketchikan Bar
Associations

EXHIBIT D.

Order.

The Supreme Court of the State of Alaska.

In the Matter of Disciplinary Proceedings Against Neil S. Mackay, an Attorney at Law. File No. ABA 8.

The order of this court dated February 8, 1965, suspending Neil S. Mackay from the practice of law for one year until reinstated, and requiring as a condition of reinstatement that the said Neil S. Mackay pay to Mary Hill Keno, or her heirs, executors or administrators, or the State of Alaska, if appropriate, the sum of $7,500 within three months after January 30, 1965, is stayed pending Neil S. Mackay's application for review by the Supreme Court of the United States.

Dated: February 9, 1965.

Bruce A. Nesbett
Chief Justice
John H. Dimond
Associate Justice

Distribution:

Neil S. Mackay
Supreme Court Justices
Superior Court Judges
Chief Judge, Court of Appeals
for the Ninth Circuit
U.S. District Court Judges
Alaska Bar Association
Clerks of Court
District Magistrates
Fairbanks, Anchorage, Juneau and
Ketchikan Bar Associations

EXHIBIT E.

Petition for Rehearing.

In the Supreme Court of the State of Alaska.

In the Matter of Disciplinary Proceedings Against Neil S. Mackay, an Attorney at Law. File No. ABA 8.

The respondent, Neil S. Mackay, respectfully petitions the Court for rehearing in the above-titled matter on the following grounds:

1. Respondent is a citizen of the United States and of the State of Alaska. The Court has misconceived and hence exceeded its jurisdiction, in that jurisdiction of the matters referred to in the Court's opinion is vested in the administrative tribunals of the Alaska Bar Association by virtue of an Act of Congress (§ 8 (d) Alaska Statehood Act, 72 Stat. 339), by the terms of which congressional enactment the Alaska Integrated Bar Act of 1955 (Ch. 196, SLA 1955) continues in full force and effect down to the present time. Thus respondent's right to be judged under said Integrated Bar Act is a right guaranteed him under the Constitution and laws of the United States and of the State of Alaska.

2. The Court has overlooked the circumstance that the Court is objectively disqualified to afford respondent a fair hearing before an impartial tribunal, inasmuch as it appears on the face of the record in this proceeding that a charge of which respondent was duly acquitted in December 1961 was resurrected by the Court in August 1964 ancillary to a controversy between the individual members of the Court, on the one hand, and the Alaska Bar Association and a substantial majority of its members (including respondent) on the

other, as evidenced by an action entitled Alaska Bar Association, et al, v. Nesbett, et al, which has at all times during the currency of the instant proceeding been pending before the United States District Court for the District of Alaska. By reason of these circumstances, the sentence of disbarment imposed upon respondent on October 26, 1964 abridges respondent's rights, as a citizen of the United States and as a member of the Alaska Bar Association, to freedom of speech and freedom of association, and his rights to due process and equal protection of the laws, under the First and Fourteenth Amendments of the Constitution of the United States and Article 1 of the Constitution of the State of Alaska.

3. The Court has overlooked the effect of the circumstance that the minutes of the proceedings before the Board of Governors of the Alaska Bar Association, used and cited by the Court in its opinion against respondent, were obtained by the Court by means of an unlawful search and seizure of the records of the Alaska Bar Association, in violation of the rights of respondent as well as of said Association under the Fourth and Fourteenth Amendments of the Constitution of the United States, with the result that the entire proceeding against respondent is fatally tainted by the use against him of the fruits of said seizure. Mapp v. Ohio, 367 US 643, 6 L ed 2d 1081, 81 S. Ct. 1684; Wong Sun v. United States, 371 US 471, 9 L ed 2d 441, 83 S Ct. 407.

4. As appears from the annexed affidavit of Bonnie M. Dodd, the Court has overlooked the circumstance that it has no official record before it of the proceedings against respondent in the administrative trial court

of the Alaska Bar Association, and consequently the failure of the Court to afford respondent a trial de novo abridges his rights to due process and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States and under Article 1 of the Constitution of the State of Alaska.

5. The Court has misconceived and overlooked the true and limited nature and extent of its jurisdiction, in that the Supreme Court of Alaska is a Court of appellate and not original jurisdiction, whose jurisdiction is fixed and determined "by law" (Article 4 § 1, Constitution of Alaska), which law includes the Alaska Integrated Bar Act of 1955, supra, the benefit of which Act was preserved for respondent by the Congress of the United States, as a federally protected right which the Court is bound to observe, by virtue of § 8 (d) of the Alaska Statehood Act (72 Stat. 339).

6. The Court has misconceived the legal effect of the apparent incompleteness of the minutes of certain proceedings before the Board of Governors, and has overlooked the circumstance that if respondent had been afforded a trial de novo he could have overcome by competent evidence the charge of irregularities before the Board, as is made plain by the attached affidavit of David H. Thorsness, Esq. The effect of these errors has been to abridge respondent's rights to due process and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States and Article 1 of the Constitution of Alaska.

7. In holding that the rules promulgated for the Alaska Bar Association by this Court, effective June 1, 1964, superseded the Alaska Integrated Bar Act of 1955 (Ch. 196 SLA 1955), as preserved by the Alas-

ka Statehood Act (72 Stat. 339) (Opinion, pp. 6-7) the Court has erroneously assumed the power to enlarge its own jurisdiction, so as to include a right to prosecute respondent for an alleged offense of which he has been duly acquitted by the only appropriate tribunal of competent jurisdiction. The effect of this error is to deprive a small and highly circumscribed group of persons of that equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States — namely those members of the Alaska Bar Association who, from time to time, happen to have been charged and acquitted of some charge or other by the statutory administrative courts of the Alaska Bar Association, and to subject these persons to a species of double jeopardy, in violation of the Fourteenth Amendment to the Constitution of the United States and Article 1 of the Constitution of the State of Alaska.

8. The December 1961 decision of the Board of Governors of the Alaska Bar Association effectively determined in respondent's favor all issues raised by the instant proceeding. Respondent asserts, accordingly, that the Court has overlooked the circumstance that the very existence of the instant proceeding violates the doctrine of res judicata, and consequently violates respondent's rights to due process and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States and Article 1 of the Constitution of Alaska.

9. In imposing upon respondent the severest possible punishment, i.e., permanent disbarment, the Court seems to have overlooked the following circumstances:

(a) Respondent has been neither accused nor con-

victed of any other act of alleged wrongdoing, either before or after the transaction referred to by the Court in its Opinion.

(b) The reason petitioner has, in the words of the Court, "done nothing to make things right with Mary" (Opinion, p. 20) is that respondent was advised by his counsel and informed by the decision of the Board of Governors to the effect that respondent was not guilty of wrongdoing Mary Keno. Petitioner unequivocally states and represents to this Court, however, that he has absolutely no desire to retain any profit or monetary advantage in any way connected with any of respondent's dealings with his client, if such dealings are, in law or in fact, improper, unethical or morally wrong.

(c) The punishment of permanent disbarment seems disproportionate when compared with the discipline customarily administered in comparable cases where it is properly determined that a lawyer has over-reached his client in business dealings concerning the client's property. Sunderlin v. State Bar of California (California 1949) 205 P 2 d 382. Reference is also made to People v. Denious (Colorado 1948) 196 P 2 d 257.

(d) Respondent has never been able to learn the identity of the person or persons who suggested to the Grievance Committee that respondent had wronged his client, Mary Hill Keno. Both Mary Hill Keno and her husband, Harmon Keno, have always maintained that they were not defrauded or cheated in any way. The attitude of Mr. and Mrs. Keno throughout the proceeding before the Alaska Bar Association is illustrated by the attached affidavits, the originals of which were furnished to and are part of the records of the Alaska Bar Association.

Counsel are not unaware that Supreme Court Rule 35 contemplates that a petition for rehearing will not exceed three pages in length. We beg the Court's indulgence in this regard because this proceeding involves the entire life and future as well as the Federal and State constitutional rights of a brother lawyer.

Dated November 3, 1964.

Respectfully submitted,
Wendell P. Kay
Arthur D. Talbot
Attorneys for Respondent
s/ By Arthur D. Talbot
Arthur D. Talbot
Of Counsel

AFFIDAVIT

State of Alaska, Third Judicial District—ss.

BONNIE M. DODD, being duly sworn, deposes and says:

I am the official Court Reporter for the United States District Court for the District of Alaska, at Anchorage, and also a partner in the firm of B&I Court Reporting Service, 215 Central Building, Anchorage, Alaska. On September 8 and 11, 1961 I recorded, by means of a Stenograph machine, the proceedings before the Trial Committee of the Alaska Bar Association concerning the grievance against attorney Neil S. Mackay in the Keno matter. The third and final day of the Mackay hearing was similarly recorded by Delores D. Runner, of B&I Court Reporting Service. To the best of my recollection and belief, my Stenograph notes were

subsequently transcribed by a transcriber employed in my office.

During the period of the Mackay hearing I was not the official Reporter of any court. Although Dolores D. Runner and I were and are Notaries Public, we acted entirely in the capacity of private individuals and not as court reporters or notaries in reporting the Mackay hearing. The witnesses at the Mackay hearing were sworn by the Chairman of the Grievance Committee.

After the Mackay hearing I forwarded a transcript of the hearing, including the documentary exhibits introduced, to the Board of Governors of the Alaska Bar Association.

Nearly three years later, in August 1964, at the request of Mr. Ernest Z. Rehbock, Assistant to the Director of the Alaska Court System, who stated that he was acting on behalf of the Supreme Court of Alaska, I furnished Mr. Rehbock, for the Supreme Court's use, my uncertified office copy of the 1961 transcript, minus the exhibits which accompanied the original transcript which I forwarded to the Board of Governors in 1961.

s/ Bonnie M. Dodd
Bonnie M. Dodd

Subscribed and sworn to before me this 2nd day of November 1964.

s/ Arthur D. Talbot
Notary Public in and for Alaska
My commission expires: 12-28-65.
(SEAL)

AFFIDAVIT

State of Alaska, Third Judicial District—ss.

DAVID H. THORSNESS, being duly sworn, deposes and says:

I was a member of the Board of Governors of the Alaska Bar Association and was present when the complaint against Attorney Neil S. Mackay was reviewed by the Board on November 30 and December 1, 1961.

With the unanimous agreement of the other Board members, I disqualified myself and abstained from voting on Mr. Mackay's case because I had been chairman of the Grievance Committee which conducted the initial investigation of this complaint. If the minutes of the Board meeting do not reflect these facts, it is entirely due to clerical oversight in the transcription of the minutes.

As a former Board member and President of the Alaska Bar Association I can state that the President does not vote except to break a tie.

s/ David H. Thorsness

SUBSCRIBED and sworn to before me this 30 day of October, 1964.

s/ Glenda H. Hauck
Notary Public in and for Alaska
My commission expires: 6-15-68

AFFIDAVIT

United States of America, State of Alaska—ss.

MARY HILL KENO, being first duly sworn upon her oath, deposes and says:

That I have no complaint against Neil S. Mackay relative to certain real property owned by me and located on Gambell Street, Anchorage, Alaska.

That Mrs. Tapanilla does not represent me in any regard, and any complaint which has been filed with the Anchorage Grievance Committee for the Alaska Bar Association, against Mr. Mackay, I hereby request that it be withdrawn for the reasons above stated.

That I hereby request that all documents relating to this matter which may be in the hands of the said Anchorage Grievance Committee be returned to me, and that they be delivered either to Neil S. Mackay or to myself.

s/ Mary Hill Keno
Mary Hill Keno

SUBSCRIBED AND SWORN TO before me this 29 day of October, 1959.

s/ George Yates
Notary Public in and for Alaska
My Commission expires: .....

STATEMENT OF HARMON KENO

I, Harmon Keno, make the following statement with regard to a real estate transaction entered into by Neil S. MacKay and Mary Hill now Mary Hill Keno.

In the late fall of 1957 I married Mary Hill and am still her lawful husband. On or about January 9, 1957, I was with Mary Hill when she and Mr. MacKay entered into a transaction for the sale by Mary Hill to Mr. MacKay of certain real property located in Anchorage, Alaska. The sale price of the property was discussed and Mary decided that it would be better for her if instead of being paid in cash that she would receive monthly payments in the amount of $150.00 per month for the remainder of her natural life. This arrangement, which was proposed by Mary Hill, was accepted by Mr. MacKay. I later discovered that in addition to the monthly payment, Mr. MacKay had paid Mary Hill the amount of $1,000 at the time the contract was entered into.

After my marriage to Mary Hill in the late fall of 1957, she informed me that she would like to settle the contract and receive a lump sun in cash instead of the previously agreed upon monthly payments. She decided at that time that a $10,000.00 cash settlement would be fair and sufficient. Consequently, we went to Mr. MacKay's office and proposed that he pay Mary Hill Keno the amount of $10,000.00 and that he be thereafter released from the obligation of making any future monthly payments. As a further share of this settlement

agreement, Mary proposed that she assign to Mr. MacKay a certain real estate mortgage. Mr. MacKay's reaction to this proposition was negative. He was quite insistent that Mary continue under the prior arrangement, pointing out to her that she had a guaranteed income for the remainder of her life. However, she insisted that Mr. MacKay settle the contract at that time. He reluctantly consented and entered into the transaction which she had proposed.

At the time of this second agreement, both Mary and I were aware that Mr. MacKay had sold the property which was the subject matter of the original contract. We were likewise both aware of the sale price which he received for this property.

On no occasion in any of my dealings with Mr. MacKay or in any dealings between Mr. MacKay and Mary Hill Keno have I ever had reason to believe that Mr. MacKay did not disclose all relevant information relating to the property. Furthermore, I know of no instance in which Mr. MacKay misrepresented the facts with regard to the property involved. It is likewise my belief that Mary Hill Keno was adequately and fairly compensated for any property which she sold to Mr. MacKay.

It is my understanding and belief that Mary Hill Keno is completely satisfied with all transactions above referred to; that she believes that she has been fairly and adequately compensated by Mr. MacKay, that she fully understood the nature of all contracts at the time of their execution, and that she has no reason whatever to believe that Mr. MacKay acted in anything other than an honest and straightforward manner.

s/ Harmon Keno
Harmon Keno

United States of America, State of Alaska, Third Judicial District—ss.

THIS IS TO CERTIFY that on this 8th day of March, 1961, before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned and sworn as such, personally appeared HARMON KENO, known to me and known to be the particular person named in and who executed the foregoing statement and he acknowledged to me that he signed and sealed the same freely and voluntarily for the uses and purposes therein mentioned.

s/ Mary Keexey
Notary Public in and for Alaska

My commission expires 7-19-64

EXHIBIT F.

Brief in Support of Petition for Rehearing.

The Supreme Court of the State of Alaska.

In the Matter of Disciplinary Proceedings Against Neil S. Mackay, an Attorney at Law. File No. ABA 8.

The following is submitted in support of respondent's petition for rehearing:

The following is submitted in support of respondent's petition for rehearing:

1. It is undisputed that in 1961 respondent was exonerated by the appropriate administrative tribunal of the Alaska Bar Association, acting pursuant to the Alaska Integrated Bar Act (AS 08.08). As this Court has correctly held herein, in its opinion of October 26, 1964, the Alaska Integrated Bar Act was "in effect at the time the trial committee and the Board acted in this matter * * *."

Approximately two and one-half years after respondent was exonerated by the Bar Association, the members of this Court promulgated its order 64 establishing a new State Bar Association and providing for its government under Court rules effective June 1, 1964. It immediately appeared to respondent and other members of the Alaska Bar Association that, if valid, the June 1, 1964 Court rules would of necessity supersede the statutory rules under which respondent had been duly exonerated of the alleged offense which is the subject matter of this proceeding. Respondent's position in this regard was expressly confirmed by the holding of this Court in its opinion of October 26, 1964 that: "The above statute (Alaska Integrated Bar

Act) has been superseded by Rule 9, sections 13 and 14 of the Alaska Bar Rules, promulgated by this court effective June 1, 1964 * * *." (Opinion, p. 7.)

Respondent was satisfied that the order and rules promulgated by the Court were invalid because in violation of the rights of Alaska lawyers under the Constitution of the United States and §8(d) of the Alaska Statehood Act (72 Stat. 339). Respondent and other members of the bar failed in their efforts to persuade the Court first not to promulgate and then to withdraw its order and rules. Respondent and over 160 like-minded members of the Alaska Bar Association then brought an action in the United States District Court against the members of this Court, seeking to uphold the Alaska Integrated Bar Act and to restrain the enforcement of the court rules of June 1, 1964. The answer interposed by the members of this Court in the action in the United States District Court was to the effect that this Court possesses "inherent power" to abrogate at will the Alaska Integrated Bar Act of 1955, the Alaska Statehood Act notwithstanding.

Thus it is plain that the precise issue of the power of this Court to entertain this proceeding against respondent under the Court's June 1, 1964 rules, for an alleged offense of which respondent was exonerated under the pre-existing statute, has been specifically raised by respondent and others in an action now pending in the United States District Court against the individual members of this Court. The question is inescapable, then, as to which is the proper tribunal to decide the crucial question of this Court's power to entertain this proceeding against respondent.

2. Respondent's position is that his choice of the federal forum may not be disturbed without his consent and that respondent has a distinct and separate right under the Constitution and statutes of the United States to have this and all related issues determined by the United States District Court. As the United States Supreme Court recently held in England v. Louisiana Medical Examiners (US 1964) US , 11 L ed 2d 440, 84 S Ct :

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific heads of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * * The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' Willcox v. Consolidated Gas Co., 212 US 19, 40, 53 L 2d 382, 394, 29 S Ct 192, 48 LRA NS 1134."

Respondent also wishes to stress that in the pending case of Alaska Bar Association, Mackay, et al. v. Nesbett, et al, the United States District Court, on October 27, 1964, specifically denied a motion by the members of this Court requesting the District Court to abstain from deciding the issues which have been raised by re-

spondent and others in the District Court action. Accordingly there is every reason for this Court, all of whose members are parties to the federal litigation, not to attempt to anticipate or foreclose the forthcoming decision of the United States District Court upon the precise issue of the power of the members of this Court to legislate for and govern the legal profession in Alaska in disregard of the Alaska Integrated Bar Act.

True, (as has been argued in the District Court by counsel for the members of this Court) respondent could seek to appeal directly to the United States Supreme Court from any adverse judgment entered against him by this Court in this proceeding. But it is equally true, as held by the United States Supreme Court in England, above, that:

> "* * * such review, even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination — often by three judges, 28 USC § 2281 — to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims.
>
> * * *
>
> "The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts."

Respondent wishes to make it entirely plain that he does insist upon his full rights under the Constitution, statutes, and laws of the United States to have all possible issues of fact and law determined by the United States District Court.

3. Respondent's reasons for participating in the instant proceedings before this Court are (1) that respondent feels obliged to do so to protect himself from the irreparable harm of even temporary disbarment; (2) because respondent has been a member of the bar of this Court ever since its creation; and (3) because respondent believes it permissible and only right that he should at least point out to this Court that the instant proceeding does violate rights guaranteed respondent under the Constitution and statutes of the United States —federal rights which respondent raised as a plaintiff in the United States District Court before the commencement of the instant proceeding in this Court.

4. The members of this Court, who are of course defendants in the case of Alaska Bar Association, Mackay, et al, v. Nesbett, et al, were nevertheless not present when that action was tried in the United States District Court on October 27, 1964. Accordingly respondent files as a separate exhibit herein a certified copy of the reporter's transcript of the trial proceedings in the District Court, in order that this Court may be fully apprised of the position taken for him by respondent's counsel in the District Court action. Respondent also respectfully refers this Court to the briefs and memoranda filed by respondent's counsel in the action in the United States District Court—all of which have no doubt been made available to the members of this Court.

Respondent specifically moves and requests this Court at this time to respect respondent's choice of the federal forum, including respondent's right to have all relevant questions of fact and law, both state and federal, determined initially by the United States District Court.

5. If this Court is unable to agree that it is objectively disqualified to pass upon respondent's case because the members of the Court were already engaged in litigating these questions against respondent in the United States Court when the instant proceeding was initiated, and if this Court will not agree to respect respondent's claim that he has a federal right to his prior choice of the United States District Court as the proper forum in which to test the authority of this Court to legislate for and govern the legal profession in Alaska, then respondent does of course hope that any question of disciplinary action against him will be rendered moot upon this Court's reconsideration of the case in light of the circumstance (as pointed out in respondent's petition for rehearing and the exhibits attached thereto) that he could not possibly be guilty of cheating his client because in all his dealings with Mary Keno respondent merely acquiesced in proposals initiated and repeatedly advanced by Mrs. Keno and her husband, neither of whom has ever complained that respondent was less than upright and honest in all his dealings with Mrs. Keno over the years.

Dated December 7, 1964.

Respectfully submitted,

s/ Arthur D. Talbot
Arthur D. Talbot
Of Counsel for Respondent

EXHIBIT G.

Supreme Court
State of Alaska
Office of the Clerk
P. O. Box 2601
Juneau, Alaska
August 28, 1964

Josephine M. McPhetres, Clerk.
Special Delivery
Mr. Neil S. Mackay
Attorney at Law
Box 886
Anchorage, Alaska
Dear. Mr. Mackay:

The Supreme Court has quite recently become aware, for the first time, of the 1961 disciplinary matter involving you, which was designated by the Board of Governors of the Alaska Bar Association as Grievance Matter No. GR-61-1. On December 1, 1961, the Board voted to sustain or concur in the dissenting opinion of the Trial Committee and dismissed the charges against you.

The court is not in agreement with and does not intend to be governed by the decision of the Board in this matter. If you so desire, the court will hear you or your counsel, at a private session of the court in Anchorage on September 12, 1964, before it issues its own order in connection with the charges. If you desire to be heard by the court you should so signify in writing to this office no later than September 4, 1964. You will be notified later of the time on September 12 that the matter will be heard.

Very truly yours,
s/Josephine M. McPhetres
(Mrs.) Josephine M. McPhetres

EXHIBIT H.

Motion to Dismiss.

In the Supreme Court of Alaska.

In re Complaint as to the conduct of Neil S. Mackay.

Comes now the respondent, NEIL S. MACKAY, by the through his attorney, WENDELL P. KAY, ESQ., and respectfully moves this Honorable Court to dismiss the pending review of a disciplinary proceeding involving him, for the following reasons:

1. The initial proceeding against the respondent was terminated by a decision of the Board of Governors dismissing the charges, on December 1, 1961; under the provisions of Section 14 of the Alaska Integrated Bar Act (Chapter 196, SLA 1955), the decision of the Board of Governors should be deemed to be final.

2. Due to the lapse of nearly three years, it is now impossible for the Court to adequately review the proceedings against the respondent, in the absence of many of the pleadings and exhibits; a fair review at the present time would seem to require a hearing de novo, since a complete review is literally impossible.

3. The respondent, having once been subjected to a full and complete hearing by Trial Committee, with complete review as provided in Section 14 of the Alaska Integrated Bar Act (Chapter 196, SLA 1955), covering the identical charges covered by the present proceeding, is, in effect, being put in jeopardy twice for the same alleged offense or offenses, in violation of Section 9, Article I of the Constitution of the State of Alaska, and the Fifth Amendment to the Constitution of the United States.

Dated at Anchorage, Alaska, this 23rd day of September, 1964.

Wendell P. Kay
Attorney for Respondent

EXHIBIT I.

Supplemental Motion to Dismiss.

In the Supreme Court of Alaska.

In re Complaint as to the conduct of Neil S. Mackay.

Comes now the respondent, NEIL S. MACKAY, by and through his attorney, WENDELL P. KAY, ESQ., and respectfully moves this Honorable Court to dismiss the pending review of a disciplinary proceeding involving him, and that this motion is in addition to the Motion to Dismiss filed herein and dated September 23, 1964, and for the following reasons:

1. This matter falls within the realm of res adjudicata.

2. This matter falls within the theory of laches in that the alleged matter is a "stale claim".

3. The matter has not been properly brought before the court.

4. The respondent has not been advised of the charges brought against him nor has he been advised of the basis upon which this court is proceeding; for this reason the respondent has been deprived of his right to defend.

5. The respondent has not been advised of the basis of the proceeding and therefore, respondent makes the general statement that the court does not have jurisdiction.

6. Pursuant to the letter from this court dated August 28, 1964, addressed to Neil S. Mackay, paragraph 1 thereof, this court apparently makes reference to a dissenting opinion of the Trial Committee and it is pointed out to the court that the findings of the

Board of Governors was the alleged dissenting opinion and any review by this court is limited to the findings of the Board of Governors and the findings of the Board of Governors as reflected in said letter dated August 28, 1964, is the dissenting opinion; that this court is bound to review only the findings of the Board of Governors and where only a part of the record, including evidence, was submitted for review, then the findings of the Board of Governors (dissenting opinion) is conclusive as to the findings and this court is limited to review of the findings of the Board of Governors; and the purpose for review in relationship to the findings is: Does the limited record substantiate the findings of the Board of Governors—The Board of Governors did not make 2 findings but rather made one finding and said finding was that the matter against the respondent should be dismissed; this court, if it is reviewing the matter, is limited to reviewing the limited record before it in relationship to the said dismissal, and if the facts warrant the dismissal, then the findings of the Board of Governors are conclusive, and if there are any doubts, then said doubts should be resolved in the favor of the accused.

7. Respondent is being denied due process of law as prescribed in the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 7, of the Constitution of the State of Alaska.

8. Respondent is being deprived of due process of law.

This motion is based on the memorandum filed herewith.

DATED this 9th day of October, 1964.

Wendell P. Kay
Attorney for Respondent

EXHIBIT J.

Rules of the Alaska Bar Association.

The Supreme Court of the State of Alaska, Order No. 64.

Promulgating the Rules
of the Alaska Bar
Association

It is Ordered:

That the Rules of the Alaska Bar Association numbered one through 13, attached hereto, are hereby promulgated as rules of this court, effective June 1, 1964.

Dated this 7th day of April, 1964.

s/ Buell A. Nesbett
Chief Justice
s/ John H. Dimond
Associate Justice
s/ Harry O. Arend
Associate Justice

Distribution:
All Members ABA
All Members Bd. of Gov. — ABA
All Members Jud. Council
Governor
Sup/C Judgs.
S/C Justs.
Dist Mags

RULES OF THE ALASKA BAR ASSOCIATION

RULE 1

ORGANIZATION OF THE ALASKA BAR ASSOCIATION

Section 1. Creation of Association. All persons admitted to the practice of law in the State of Alaska are hereby organized as an association to be known as the Alaska Bar Association and shall be subject to the rules hereinafter set forth. These rules are adopted in the exercise of the Supreme Court's inherent authority over members of the legal profession as officers of the Court and shall be called the Alaska Bar Rules.

Section 2. Purposes. The purposes of the Alaska Bar shall be to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to carry on a continuing program of legal research in the technical fields of substantive law, practice and procedure, and make reports and recommendations thereon; to the end that the public responsibility of the legal profession may be more effectively discharged.

Section 3. Legal Entity. In order to carry out the purposes for which it is organized, the Alaska Bar As-

sociation may sue and be sued, enter into contracts, acquire, hold, encumber and dispose of real and personal property.

Section 4. Definitions. The words "Alaska Bar" whenever used in these rules mean the Alaska Bar Association. The words "the Court" and "Court" mean the Supreme Court of Alaska unless the context requires otherwise. The word "President" shall mean the President of the Alaska Bar.

RULE 2

MEMBERSHIP

Section 1. Persons Included in Membership. The membership of the Alaska Bar initially shall consist of all of those persons who on the date when these rules take effect are admitted to the practice of law in this state, and after these rules take effect shall include all persons who become licensed from time to time to practice law in this state. All members shall be subject to due compliance with the conditions and requirements of membership. Residence in Alaska shall not be a condition to eligibility to maintain membership in the Alaska Bar.

Section 2. Enrollment. Persons presently members of the Alaska Bar Association as created by AS 08.08.010 shall be enrolled in the Alaska Bar by virtue of such membership. Every other person admitted to the practice of law in this state shall enroll in the Alaska Bar by registering his name with the Secretary of the association within sixty days after the effective date of these rules in accordance with the requirements of the bylaws. Every person who becomes licensed to practice

law in this state after these rules become effective shall enroll in the Alaska Bar in like manner by registering his name with the Secretary of the association within ten days after admission to practice. After such enrollment every change in any member's office or residence address or principal office location shall be reported promptly to the Secretary.

Section 3. Classes of Membership. The members of the Alaska Bar shall be divided into three classes known respectively as "active" members, "judicial" members, and "inactive" members. The class of active members shall include all members of the Alaska Bar except the "judicial" members and "inactive" members. The class of inactive members shall be limited to those persons who are eligible for active membership but are not engaged in the practice of law in this state and have filed with the Secretary of the Alaska Bar written notice requesting enrollment as an inactive member. Judges of courts of record and retired judges who are eligible for temporary judicial assignment and are not engaged in the practice of law shall be classed as "judicial' members. Any inactive member in good standing, and any judicial member who is no longer a judge of a court of record, may change his classification to that of active member by filing with the Secretary a written request for transfer and by paying the dues required of active members. A judicial member who is no longer a judge of a court of record shall be classified as an active member if he engages in the practice of law in this state. No judicial or inactive member shall be entitled to practice law in this state or to hold office in the Alaska Bar or to vote in any election conducted by the association or on any matter presented

at any meeting thereof. No person engaged in the practice of law in this state in his own behalf or as an assistant or employee of an active member of the Alaska Bar, or occupying a position the duties of which require the giving of legal advice shall be eligible for enrollment as an inactive member.

Section 4. Only Active Members May Practice Law. No individual other than an enrolled active member of the Alaska Bar shall practice law in this state or in any manner hold himself out as authorized or qualified to practice law. Any court in this state may by special permission granted by it allow nonresident counsel to appear and participate in a particular action or proceeding in accordance with Rule 81 of the Rules of Civil Procedure.

Section 5. Membership Dues. Every active member shall pay membership dues in such amount, not exceeding $100.00 per year, as may be fixed in the bylaws, and dues may be graduated depending on the number of years a member has practiced law. Every judicial and inactive member shall pay membership dues in such amount, not exceeding $10.00 per year, as may be fixed in the bylaws. All dues shall be paid to the Treasurer of the Alaska Bar and shall constitute a fund for the payment of the expenses of that association.

Section 6. Penalty for Nonpayment of Dues. Any active, judicial or inactive member failing to pay any dues within sixty days after they become due shall be suspended automatically from membership in the Alaska Bar. He may be reinstated upon payment of accrued dues and such penalties as may be imposed by the Board, in the manner provided in section 17, rule 9.

Section 7. Voluntary Resignation of Membership. Whenever a member of the Alaska Bar in good standing files with the Secretary written notice of his election to surrender his certificate to practice law and to terminate his membership in the association, such person shall thereupon cease to be a member of the Alaska Bar, and his name shall be removed from the membership register.

RULE 3

OFFICERS

Section 1. Titles; Nomination and Election. The officers of the Alaska Bar shall be a President, a President-Elect, a Secretary, and a Treasurer. The active members of the Alaska Bar who are in actual attendance at the annual convention shall elect by a majority vote during the convention the association's officers from the membership of the Board of Governors. The term of office of each officer shall be one year and until the election and qualification of his successor, except that those holding office on the effective date of these rules shall continue to hold office until the next annual meeting.

Section 2. Duties of Officers.

President: The President shall be the chief executive officer of the Alaska Bar, and shall preside at all meetings of the association and of the Board of Governors. He shall appoint and announce as soon as possible after the annual meeting each year the membership of all committees for the ensuing year, the appointment of which shall not have been otherwise provided for. He shall be a member ex-officio of every standing committee and every special committee.

President-Elect: The President-Elect shall perform the duties of the President during the absence or disability of the President; and at the expiration of the one year term of office of the President, the President-Elect shall succeed to the office of President. In the event of the death or resignation of the President prior to expiration of his term of office, the vacancy shall not be filled and the duties of the office during the unexpired term shall be performed by the President-Elect, and at the expiration of the term the President-Elect shall succeed to the office of President in the same manner as if such vacancy in the office of President had not occurred.

Secretary: The Secretary shall act as secretary at all meetings of the Alaska Bar, of the Board of Governors, and of the executive committee, and shall keep a record of all the proceedings thereof. He shall notify officers and members of the committees of their election or appointment. He shall prepare and maintain a register of all active, judicial and inactive members of the Alaska Bar and, subject to direction of the Board of Governors, shall send out notices of all elections and meetings. He shall perform all other duties assigned to him by these rules or by the bylaws or by the Board of Governors. The Secretary may succeed himself in office.

Treasurer: The Treasurer shall receive, collect and safely keep, and under the direction of the Board of Governors disburse, all funds of the Alaska Bar; and render reports of receipts and disbursements as required. He shall assist the executive committee in preparing the annual budget. He shall furnish a surety bond at the expense of the Alaska Bar in such amount

as may be required by the Board of Governors. The Treasurer may succeed himself in office.

Section 3. Delegation of Duties. Any duties imposed by these rules or by the bylaws of the Alaska Bar upon the President, Secretary or Treasurer may be performed under the supervision of such officers respectively, by assistants or employees of the association.

RULE 4

BOARD OF GOVERNORS

Section 1. Governing Body. The Alaska Bar shall be governed by its Board of Governors. The Board has the powers and duties conferred by these rules. Members of the Board shall receive no salary.

Section 2. Composition of the Board of Governors. The Board of Governors shall consist of nine active members elected by the active members of the Alaska Bar from the four judicial districts, three members from the First Judicial District, three members from the Third Judicial District, and three members from the combined area of the Second and Fourth Judicial Districts. Not more than two members may be resident attorneys in the Fourth Judicial District when there are 4 or more resident active members in the Second Judicial District.

Section 3. Election; Term of Office. Members shall be elected to the Board of Governors in accordance with the bylaws of the Alaska Bar. Upon election, members of the Board of Governors shall hold office for three years and until their successors are elected and qualified. Those members of the Board of Governors on the effective date of these rules shall con-

tinue as members until the next annual meeting. Three Board members shall be elected annually, one from each area as described in this rule.

Section 4. Vacancies on the Board of Governors. Vacancies in Board membership shall be filled by appointment by the remaining Board members until the next annual election, at which time a successor shall be elected to fill the remainder of the unexpired term.

Section 5. Functions. The Board of Governors shall have general charge of the affairs and activities of the Alaska Bar. It shall have authority to fix a time and place for the annual meeting of the members; to make appropriations and authorize disbursements from the funds of the association in payment of the necessary expenses of the association; to engage and define the duties of employees and fix their compensation; to receive, consider and take action on reports and recommendations submitted by committees, sections and the members at any annual or special meeting; to conduct investigations of matters affecting the Alaska Bar, or the practice of law or the discipline of members of that association; to fill vacancies however arising in the membership of the Board of Governors, or in any office except the office of President, and in each case the person appointed to fill such vacancy shall hold office until the next annual election; and to adopt bylaws and regulations not inconsistent with these rules for the orderly administration of the Alaska Bar's affairs and activities.

The Board of Governors shall meet from time to time as necessary, and as required by the bylaws. A majority of the whole Board shall constitute a quorum for any meeting.

The Board of Governors may establish and maintain standing committees having respectively the functions defined in the bylaws and shall have authority to create additional standing committees and such special committees as may be deemed desirable from time to time, and to define the authority and functions of such standing and special committees. The Board of Governors may also establish and maintain sections for carrying on the work of the Alaska Bar, each within its proper field of study. Each section shall consist of members who voluntarily enroll therein because of a special interest in the particular field of law to which the section is dedicated. New sections may be established and existing sections may be consolidated or discontinued by the Board of Governors from time to time.

The members of the Board of Governors shall receive no compensation for services rendered, but they and also the members of committees and officers and directors of sections may be reimbursed for necessary expenses incurred in the performance of their duties and for extraordinary services performed.

Section 6. Powers of Board. The Board may adopt reasonable bylaws and regulations not inconsistent with these rules:

(1) Concerning membership and the classification of membership;

(2) Concerning the enrollment and privileges of the membership;

(3) Providing for other officers of the Alaska Bar, the time, place and method of their selection, and their respective powers, duties, terms of office and compensation;

(4) Concerning annual and special meetings;

(5) Concerning the collection, deposit and disbursement of membership and admission fees, penalties and all other funds;

(6) Providing for the organization and government of local subdivisions of the Alaska Bar;

(7) To contract and arrange for the publication of an Alaska Law Journal;

(8) Providing for all other matters, whether similar to the foregoing or not, affecting in any way whatsoever the organization and functioning of the Alaska Bar. The bylaws and regulations adopted by the Board or the members of the Alaska Bar under these rules shall not be subject to the Administrative Procedure Act.

RULE 5

EXECUTIVE COMMITTEE

Section 1. Membership. There shall be an executive committee consisting of the officers of the Board of Governors.

Section 2. Chairman; Minutes of Meeting. The President shall preside at meetings of the executive committee and the Secretary shall keep minutes of its proceedings. The minutes of each meeting of the executive committee shall be submitted to the next meeting of the Board of Governors.

Section 3. Powers. Unless otherwise ordered by the Board of Governors, the executive committee may exercise all of the powers and perform all of the duties of the Board between meetings of the Board. The executive committee shall prepare an annual budget for submission to the Board of Governors and shall perform

such other duties as the Board may from time to time prescribe.

Section 4. Meetings. The executive committee shall meet at the call of the President, or upon the call of the Secretary upon written application of a majority of its members, upon 48 hours notice by mail, telegraph or telephone. A majority of the members of the executive committee shall constitute a quorum. Action by a majority of the members present at a meeting shall constitute action by the executive committee.

RULE 6

MEETINGS OF THE ALASKA BAR

Section 1. Annual Meeting. There shall be an annual meeting of members of the Alaska Bar. The Board of Governors shall determine the time and place of the annual meeting and shall arrange therefor a suitable program which shall include an address by the President. Reports of officers and reports of proceedings of the Board of Governors and the executive committee subsequent to the last previous annual meeting shall be presented to the meeting. The election of officers of the Alaska Bar shall be held at the annual meeting.

Section 2. Special Meetings. Special meetings of the members of the Alaska Bar may be called by the Board of Governors, and shall be called by the Secretary whenever he receives a petition signed by 35 percent of the active members of the Alaska Bar requesting such meeting and specifying the purpose thereof, and the meeting shall be convened accordingly within 45 days after the Secretary receives such petition. It shall be the duty of the Board of Governors to fix the time and place for every special meeting, to make suitable

arrangements therefor, and to cause the Secretary to give notice thereof to the members.

Section 3. Quorum. A majority of the active members registered and present in person at any annual or special meeting shall constitute a quorum. No member shall be entitled to be represented by proxy.

Section 4. Notice. Notice of the time and place of every annual meeting of members shall be mailed by the Secretary to all members of the Alaska Bar at least thirty days prior to the meeting. Notice of the time, place and purpose of every special meeting of members shall be mailed by the Secretary to all members of the Alaska Bar at least ten days prior to the meeting.

Section 5. Recommendations to Board of Governors. The active members present in person at any annual or special meeting of members of the Alaska Bar may consider and adopt any proposal pertinent to the purposes of the association; provided that every such proposal which is adopted shall constitute a recommendation from the membership to the Board, and shall be referred accordingly to the Board for such action as they may deem proper, except as otherwise required in the case of a direction for a referendum under the provisions of Rule 7 or in the case of a proposal for amendment of these rules.

RULE 7
REFERENDUM PROCEDURE

Section 1. Governors May Initiate. The Board of Governors may at any time upon an affirmative vote of two-thirds of its members refer to the active members of the Alaska Bar for determination by mail ballot any question of association policy.

Section 2. Members May Initiate by Petition. The Board of Governors shall, in like manner, submit for determination by the active members of the Alaska Bar any question of association policy, including proposals for changes in the rules or bylaws, whenever directed so to do by a petition signed by 25 percent of the active members of the Alaska Bar.

Section 3. Procedure. Ballots for use in any such referendum shall be prepared, distributed, returned and counted in accordance with regulations prescribed by the Board of Governors. The result of the referendum, as determined by a majority of the votes cast, when duly ascertained shall control the action of the Alaska Bar, the Board of Governors, the officers, sections and committees.

RULE 8

DISBURSEMENTS

The Board of Governors shall make necessary appropriations for disbursements from the funds in the treasury to pay all necessary expenses of the Alaska Bar, its officers and committees. It shall be the duty of the Board of Governors to cause proper books of account to be kept and to procure an annual audit and financial statement by a public accountant. At each annual meeting of the Alaska Bar the Board of Governors shall present a financial statement showing assets, liabilities, receipts and disbursements of the association. A copy of such statement shall be filed with the Clerk of the Supreme Court.

RULE 9

GRIEVANCE COMMITTEES, PROCEDURES AND REINSTATEMENT

Section 1. Grounds for Discipline. Any member or lawyer may be reprimanded, suspended, disciplined or disbarred for any of the following causes:

(a) Conviction of any felony. Conviction of any misdemeanor involving moral turpitude. The record of such conviction shall be conclusive evidence of the same. Upon such conviction, a member shall be automatically suspended for a period not to exceed ninety days, during which period the local grievance committee in the area where the conviction took place shall promptly undertake proceedings to secure a final determination of the member's right to practice. This subsection does not affect the power of a court to grant injunctive relief or to punish for contempt.

(b) Willful disobedience or violation of any order of a court requiring him to do or to forbear from doing any act connected with, or in the course of, his profession, which he ought in good faith to do, or forbear from doing.

(c) Violation of his oath as an attorney, or of his duties as an attorney and counselor.

(d) Corruptly or willfully, and without authority, appearing as an attorney for a party to an action or proceeding.

(e) Lending his name to be used as an attorney by another person who is not an attorney licensed to practice law in the State of Alaska.

(f) For the commission of any act involving moral turpitude, dishonesty or corruption, whether the same

be committed in the course of his relations as an attorney, or otherwise, and whether the same constitutes a felony or misdemeanor or not. If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment, reprimand or suspension from practice.

(g) Misrepresentation or concealment of a material fact made in his application for admission or in support thereof.

(h) Disbarment by any foreign court of competent jurisdiction.

(i) Practicing law with or in cooperation with a disbarred or suspended attorney, or maintaining an office for the practice of law in a room or office occupied or used, in whole or in part, by a disbarred or suspended attorney, or permitting a disbarred or suspended attorney to use his name for the practice of law, or practicing law for and on behalf of a disbarred or suspended attorney, or practicing law under any arrangement or understanding for the division of fees or compensation of any kind with a disbarred or suspended attorney, or any person not a licensed attorney.

(j) Gross incompetency in the practice of his profession.

(k) Membership in any party or organization having for its purpose or object the overthrow of the United States Government by force or violence.

(l) Incompetence in the profession or misconduct in or outside of the practice of the profession tending to show that he is an unfit or unsafe person to enjoy the privileges of the profession or to manage the business of others in the capacity of attorney or which tends

to bring reproach upon the profession or injure it in the favorable opinion of the public.

(m) Willfully misleading or deceiving the court or committing any act which tends to pervert or obstruct justice or its administration.

(n) Soliciting business or litigation or knowingly accepting litigation or business procured by solicitation.

(o) The publication of professional cards, or other advertising, except in periodicals approved by the American Bar Association, and in instances approved by the American Bar Association, is prohibited. Listings in telephone directories shall not be in bold type or contain information not approved by the said Association.

(p) Violation of the rules of professional conduct set forth in the Canons of Professional Ethics.

Section 2. Grievance Committees. The President, with the consent of the Board of Governors, at its first meeting each year shall appoint such grievance committees as are necessary, including committees at Ketchikan, Juneau, Anchorage and Fairbanks. Each committee shall consist of at least three active members of the Alaska Bar whose offices are located in the same area. One member shall be designated chairman by the President. At any time the President may appoint an additional grievance committee with the consent of the Board. Each committee shall convene as often as necessary at a time and place designated by the chairman. A majority of the committee shall constitute a quorum. The action of the majority of the quorum shall be the action of the committee. Members of committees serve at the pleasure of the President, and vacancies shall be filled by the

President pending action by the Board. Members of the Board may be members of a grievance committee.

Section 3. Powers of Grievance Committee. Each grievance committee shall have the responsibility and the power and authority to investigate, hear, receive evidence, make findings of fact and recommendations on any matter of alleged misconduct or reinstatement within its area, subject to the right of the Court to take final action thereon.

Section 4. Alaska Bar Counsel; Investigation. At any time, at the request of a grievance committee, the President shall employ counsel to represent the Alaska Bar in any investigation or proceeding before a grievance committee or any court. Likewise, at the request of a grievance committee or such counsel, the President shall employ competent investigators to assist the committee or counsel. It shall be the duty of counsel to investigate or cause to be investigated any matters of alleged misconduct, to prepare and file all pleadings and present all available evidence and arguments on behalf of the Alaska Bar bearing on discipline or reinstatement, and to prosecute each such matter in accordance with these rules. The chairman of each grievance committee shall have the right to order an informal investigation to be made by the committee without requesting that counsel be appointed. Whenever any investigation discloses that a crime may have been committed, the chairman shall have the authority to request any law enforcement office in this state to assist in any investigation and to furnish all available information concerning the respondent. All state, borough and city law enforcement officers shall promptly comply with every such request. Written reports of all investigations

shall be made to the grievance committee and copies shall be supplied to the Board of Governors and to any counsel employed by the Board to investigate or prosecute the proceedings.

Section 5. Initial Complaint Procedures. All complaints of misconduct shall be in writing, and if practicable signed by the person complaining. The complainant shall make a brief statement of the details of each act of alleged misconduct and the approximate time and place thereof. Within three days after receipt by the committee or any member thereof, the chairman shall serve copies on the respondent in accordance with section 20 of this rule. Copies shall, within the same time, be mailed to the President and the Clerk of the Supreme Court. It shall be the duty of the respondent within ten days after service to make a full and fair disclosure in writing of all the material facts and circumstances pertaining to his conduct in relation to matters set forth in the statement. The deliberate failure to make disclosure or any knowing misrepresentation or concealment of any facts and circumstances by the respondent shall be grounds for discipline. The respondent shall serve and mail copies of his disclosure in the same manner as provided for the service of the statement by the grievance committee and shall serve the chairman of such committee.

Section 6. Informal Consideration. Within twenty days after receipt of respondent's disclosure, the chairman shall convene the committee for an informal consideration of the statement, disclosure, and any investigative reports. It shall be the duty of the respondent to attend any meeting when requested to do so by the chairman or committee and to answer fully and

fairly all questions pertaining to his conduct that may be put to him by the chairman or other members of the committee, or by counsel for the Alaska Bar, or the complainant. The informal proceeding shall be electronically recorded with facilities provided by the Alaska Court System and the record thereof preserved by the committee. Before the conclusion of the meeting, the committee shall decide for dismissal, reprimand or formal action.

Section 7. Dismissal; Reprimand; Procedures. If the grievance committee decides that there are no grounds for discipline, it shall dismiss the matter. If the committee decides that the facts are sufficient to warrant only a private reprimand, it shall forthwith administer such reprimand, unless a formal hearing is demanded by the respondent. The chairman shall forthwith report such dismissal or reprimand in writing to the President and the Clerk of the Supreme Court, together with a statement of the committee's reasons. Disposition by dismissal or reprimand shall be subject to the approval of the President, who shall approve or disapprove within ten days of receipt of the committee's report. A copy of the President's written action on the report shall be filed with the committee and the Clerk of the Supreme Court. The President, in his discretion, may review the electronic record of the informal consideration.

Section 8. Formal Complaint; Hearing. If the grievance committee finds that there are reasonable grounds to believe that the respondent is guilty of misconduct warranting discipline by the Court, written report shall be made in the manner provided for dismissals or reprimands in section 7 of this rule. In such event, or if respondent demands, or if the President orders a formal

hearing, a formal complaint, conforming generally with the provisions of section 21 of this rule, and setting forth the facts of the alleged misconduct, shall be prepared and signed by counsel for the Alaska Bar. If such counsel has not theretofore been employed, the President shall forthwith do so. The formal complaint shall be filed with the grievance committee within five days after the date of the committee's report, or the President's order. Upon the filing of the formal complaint, the chairman shall fix a time and place for hearing thereon. The chairman shall without delay cause a written notice of the hearing together with a copy of the formal complaint to be served on the respondent in accordance with sections 20 and 21 of this rule. The chairman shall mail copies of the notice and complaint to the President and the Clerk of the Supreme Court. The serving of notice of hearing shall be conclusive evidence of the findings of reasonable cause to believe that the respondent is guilty of the alleged misconduct. Formal hearing on the formal complaint shall be held within ten days after its service on respondent unless further time is allowed by the chairman for good cause shown.

Section 9. Answer; Hearing Procedure. The respondent shall file an answer to the formal complaint. Such answer shall be in writing, verified by the respondent, and filed with the committee and the Clerk of the Supreme Court. The respondent shall serve copies thereof on the President and on counsel for the Alaska Bar whose name appears on the complaint. Filing and service shall be made within five days after service of the notice of hearing, unless further time is allowed by the chairman of the committee for good cause shown. The

answer shall conform generally to the form suggested in section 21 of this rule. If the answer is not filed and served within the time limited, and no extension of time has been granted, the complaint may be taken as confessed. It shall be the duty of the respondent to appear in person before the grievance committee at the formal hearing. Respondent may be represented by counsel, who shall enter his appearance. At the formal hearing it shall be the duty of the respondent to present himself for cross-examination and to answer fully and fairly, under oath, all questions pertaining to his conduct that may be put to him. An electronic recording of the hearing shall be made with facilities provided by the Alaska Court System and the hearing shall be conducted, as nearly as may be, in conformity with the procedure established for the trial of non-jury civil cases in the superior court.

Section 10. Voluntary Surrender of License. No request by a member of the Alaska Bar that his name be stricken from the official register of attorneys shall be considered or acted upon by the Board or Court while any matter of misconduct alleged to have been committed by him is pending, unless such request is incorporated in and made a part of a written answer to a formal complaint admitting the facts of the alleged misconduct set forth in the complaint. Every such request may be considered as a voluntary surrender by the respondent of his certificate to practice law, and shall entitle the grievance committee, in its discretion, to find that the charges of misconduct are true and uncontested, and to make and file its certified report with recommendations for discipline without further proceedings.

Section 11. Hearing; Findings; Recommendations. If upon formal hearing the grievance committee finds that the charges of misconduct are not established by a preponderance of the evidence, the committee shall dismiss the complaint. If the grievance committee finds that the charges of misconduct are established by a preponderance of the evidence and are such as to warrant discipline only by way of private reprimand, the committee shall administer such reprimand.

If the grievance committee finds that the charges of misconduct are established by a preponderance of the evidence and are such as to warrant discipline by the Supreme Court, the committee shall make a written report of its findings of fact and recommendations for discipline and forward them to the Clerk of the Supreme Court, together with the electronic recording and a summary statement of all previous misconduct for which the respondent has been disciplined. Copies of the findings, recommendations and summary statement shall be mailed to the President and served on respondent or his counsel within ten days after the hearing is concluded. In the event of dismissal or private reprimand, the committee shall likewise make, mail and serve findings and recommendations and forward the electronic recording.

Section 12. Petition for Review. If private reprimand has been administered or if discipline has been recommended, the respondent, within five days after the date of filing the committee's report with the Clerk of the Supreme Court, may petition the Court for review of the proceedings, findings and recommendations of the committee. In the event of dismissal or private repri-

mand, the President may likewise petition the Court for review.

Section 13. Review. All reviews shall be on the record unless the Court, in its discretion, grants a hearing de novo, in whole or in part. Following review, the Court shall enter a final order disposing of the matter as it sees fit.

Section 14. Procedure When Uncontested. If no petition for review is made within the time limited, the Court may issue an order of dismissal, reprimand, disbarment, suspension, or order review on its own motion, as it sees fit.

Section 15. Procedure on Reinstatement. No person whose certificate to practice law has been revoked, surrendered, or suspended shall be reinstated as a member of the Alaska Bar otherwise than upon a verified petition filed with the Court. No petition shall be entertained until after the expiration of any minimum period of time specified in the order of discipline. The petitioner shall serve nine copies of the petition on the President, together with nine copies of each of the following:

(a) Judgment or order of conviction or suspension, together with all findings of the grievance committee and opinions of courts, if any, recommendations, decisions and record of the proceedings by virtue of which the petitioner stands suspended or disbarred.

(b) All prior petitions for reinstatement which may have been filed in his behalf, and all findings, decisions, or orders made or entered in connection therewith. The petitioner must, at such time as may be required, furnish such other information as in the opin-

ion of the Board may be necessary or desired. In addition to any other requirement hereof, the petition itself shall set forth fully and accurately the following information covering the period between the date of disbarment or suspension or resignation, as the case may be, and the date of filing the petition, to-wit: (1) name, age, residence, address and number of relation of dependents of the petitioner; (2) the offense or misconduct upon which the disbarment or suspenison was based, together with the date of such disbarment or suspension or, in the case of resignation from the Alaska Bar, the reason for his resigning; (3) the names and addresses of all complaining witnesses in any disciplinary proceeding which resulted in the disbarment or suspension and the names and addresses of the justices or committee members before whom such disciplinary proceedings were held or of the trial judge, complaining witnesses, and prosecuting attorney, if disbarment was based upon conviction of a felony or misdemeanor involving moral turpitude; (4) the nature of petitioner's occupation, in detail, during said period with the names and addresses of all partners, associates in business and employers, if any, and dates and duration of all such relations or employment; (5) a statement showing the approximate monthly earnings and other income of petitioner and the sources from which all such earnings and incomes were derived during the said period; (6) a statement showing all financial obligations of petitioner at date of filing the petition together with the dates the same were incurred and the names and addresses of all creditors; (7) a statement showing dates, general matters and ultimate disposition of any matter involving arrest or prosecution of the said peti-

tioner; (8) a complete and concise statement of facts claimed to justify reinstatement to the Alaska Bar.

The President shall assign the petition to a grievance committee for investigation and hearing in the same manner as matters of alleged misconduct, except that all hearings on such petition shall be public, and the committee shall recommend the granting or denial of the petition only after personally examining the petitioner under oath. No person shall be recommended for reinstatement unless his eligibility for reinstatement, considered in the light of the misconduct for which he was disciplined, has been established by evidence that is clear and convincing. The President, upon receipt of a copy of the petition, shall cause notice thereof to be given to each member of the Alaska Bar in such manner as the President deems expeditious. The President or any member of the Alaska Bar may object to any recommendation for reinstatement and may do so not later than sixty days after such recommendation has been filed with the Clerk of the Supreme Court.

Section 16. Subpoenas; Evidence. Each grievance committee of the Alaska Bar shall have the power to issue subpoenas, including subpoenas duces tecum, and to cause evidence, including testimony, to be taken under oath, and to rule upon the admissibility of such evidence according to the rules of evidence in civil cases, in any matter of misconduct or reinstatement assigned to the committee for investigation and hearing under this rule. Any member of a grievance committee is authorized to administer such oath. Witnesses commanded by subpoena to appear and give evidence before a grievance committee shall be paid the same fees and mileage as witnesses subpoenaed to testify in the superior court.

All such subpoenas shall be issued in the name of the Alaska Bar Association and be signed by any member of a grievance committee. Witnesses may be permitted to testify by affirmation, rather than under oath, in proper cases.

Section 17. Reinstatement after Suspension for Nonpayment. Whenever any member of the Alaska Bar applies for reinstatement after having been suspended for nonpayment of membership dues, the application shall be granted upon the payment of delinquent dues and any penalties provided by the bylaws when it appears that the applicant's membership dues have not been in arrears for more than two consecutive years. The application shall not otherwise be granted unless reinstatement is ordered by the Court. If the applicant in such case petitions the Court for reinstatement, the petition shall set forth a description of the petitioner's business and professional activities during the period of suspension, shall state whether or not such activities have included the practice of law and, if so, the particulars in that regard. The petitioner shall file a copy of the petition with the President and shall pay the full amount of membership dues then in arrears, including accrued penalties. Thereupon, the President shall cause an investigation to be made by a grievance committee concerning the petitioner's business and professional activities during the period of his suspension and his eligibility for reinstatement as a member of the Alaska Bar. It shall be the duty of the petitioner to appear before the committee in person, if requested to do so, and to answer oral or written interrogatories relative to his eligibility for reinstatement. Failure on his part to appear and answer interrogatories, or any concealment or misrep-

resentation in that regard, shall be grounds for denying the petition. Upon completion of such investigation, the committee's report containing its findings and recommendations with respect to the petitioner's eligibility for reinstatement, and also the recommendations of the President with respect thereto, shall be filed by the President with the Court. Hearing on the petition for reinstatement shall be deferred until such report and recommendations shall have been filed. The petitioner shall be required to reimburse the Alaska Bar for the reasonable expenses of the investigation.

Section 18. Depositions. The testimony of any witness may be taken by deposition in any matter pending before a grievance committee.

Section 19. Contempt. The neglect or refusal of any person without just cause to appear and give evidence as demanded in any subpoena issued and served pursuant to this rule, or to be sworn or to affirm, or to answer any proper question put to him, shall be a contempt of the Supreme Court and shall be punishable as such by any justice thereof. The neglect or refusal of any member of a grievance committee or appointed counsel to perform with dispatch the duties imposed by these rules shall be a contempt of the Supreme Court, punishable as such by any justice thereof.

Section 20. Service. Whenever the service of any notice or other paper is required by any section of this rule, such service shall be valid if made personally anywhere the receipient may be found, or by certified mail, or upon counsel of record in accordance with the rules of procedures pertaining to service of papers on counsel.

Section 21. Forms; Complaint; Notice; Answer. The following forms are intended for illustration only.

(a) Complaint

STATE OF ALASKA

Before the Alaska Bar Association Grievance Committee at ....., Alaska.

Alaska Bar Association, vs. ....., Respondent.

Action No. .....

COMPLAINT

The Alaska Bar Association complains and alleges that the respondent, ..., a member of the Alaska Bar, is guilty of misconduct committed as follows:

I.

The respondent, at ....., in the ..... Judicial District, State of Alaska, on or about the ....day of ....., 19...., did (here state essential facts constituting the offense charged), contrary to the provisions of Alaska Bar Rule ....., Section .....

Dated and signed at ....., Alaska, this .... day of ....., 19.....

Alaska Bar Association
By
Counsel

(b) Notice of Hearing

STATE OF ALASKA

Before the Alaska Bar Association Grievance Committee at ....., Alaska.

Alaska Bar Association, vs. ....., Respondent. Action No. .....

NOTICE OF HEARING

TO the above Respondent:

You are hereby notified that a complaint against you for misconduct has been filed with the Grievance Committee of the Alaska Bar Association, a copy of which complaint is served herewith. You shall file your verified answer to said complaint within five (5) days from the date of service of this notice upon you. In case you default in so answering, the committee shall have such further proceedings on the complaint as the rules provide. Copies of your answer must be filed with this Grievance Committee at ....., Alaska, and with the Clerk of the Supreme Court. Copies of the answer must be served on counsel for the Alaska Bar as shown on the complaint, and the President of the Alaska Bar.

Dated and signed at ....., Alaska, this ..... day of ....., 19.....

Alaska Bar Association
By its Local Grievance Committee
at ....., Alaska

.....
Chairman (or Member)

(c) Answer

STATE OF ALASKA

Before the Alaska Bar Association Grievance Committee at ....., Alaska.

Alaska Bar Association, vs. ....., Respondent. Action No. .....

ANSWER

....., Respondent, who resides at ..... and whose address is ..... in the City of..... ....., and who maintains his principal office for the practice of law at ....., answers the complaint in the above entitled matter as follows:

I.

Admits the following matters charged in the complaint:

II.

Denies the following matters charged in the complaint:

III.

Explains or justifies the following matters charged in the complaint:

IV.

Sets forth new matter and other defenses not previously stated as follows:

WHEREFORE, the respondent prays that the complaint be dismissed.

Dated and signed at ....., Alaska, this ..... day of ....., 19.....

Respondent

Attorney for Respondent

State of Alaska .....District—ss.

....., being sworn on his oath says: I am the respondent named in and who executed the foregoing Answer; that I have read the same, know the contents thereof and believe the statements to be true.

Subscribed and Sworn to before me this .... day of ...., 19.....

Notary Public for Alaska.
My commission expires: .....

Section 22. Restrictions on Publicity. No investigation or hearing of any matter of misconduct conducted by a grievance committee shall be open to the public, and none of the records or files of any grievance committee shall be disclosed to, or examined by, anyone other than members of the committee, the Board of Governors, the President, counsel employed by the Alaska Bar, the Supreme Court, the named respondent and his counsel, and employees authorized by any of the foregoing. All papers and the electronic tape on file with the Supreme Court concerning misconduct shall be suppressed by order of the Court without formal application and shall remain subject to such restriction until the time fixed for hearing thereon in open court. Any violation of these restrictions shall be a competent of the Court and punishable as such. Nothing herein shall apply to proceedings or papers dealing with petitions for reinstatement. The foregoing restrictions on publicity are for the protection of the member under investigation and may be waived by him in writing. Such waiver must be as to all of the restrictions contained in this section and not as to a part only.

Section 23. Expenses. It shall be the duty of the chairman of each grievance committee to ascertain the expenses of investigation and hearing of each matter of misconduct and reinstatement considered by such committee and include an itemized statement of the amount thereof in its report to the President. The Board of Governors shall approve and honor expenses so approved as provided in rule 8.

Section 24. Amendments. Amendments to any complaint, petition, notice, answer, report, or order may be made at any time prior to the final court order. The party affected by the amendment shall be given a reasonable opportunity to meet any new matter presented thereby.

Section 25. Construction. Process and procedure under this rule shall be as summary as may be reasonable. No investigation or proceedings hereunder shall be held invalid by reason of any nonprejudicial irregularity, nor for any error not resulting in a miscarriage of justice. The provisions in the various sections of this rule shall be liberally construed for the protection of the public, the courts and the legal profession, and shall apply to all pending matters of misconduct and reinstatement so far as may be practicable, and to all future matters notwithstanding the alleged misconduct occurred prior to the effective date hereof. To the extent that application of any provision of this rule to any pending matter shall not be practicable, the rules in effect at the time this rule becomes effective shall continue to apply. The powers invoked by the various sections of this rule are in addition to, and not a substitution for, other powers possessed by the courts of this state, and by the Attorney General. All proceedings under

this rule are declared to possess the characteristic and incidence of the judicial function, including the incidence of privilege as to statements made therein.

RULE 10

PRACTICE OF LAW

When done by a person who has not been admitted to practice law in this state, the unauthorized practice of law shall include conveyancing, incorporation service, preparation or drafting of wills, leases, mortgages, bills of sale, contracts and deeds; provided that magistrates, United States Commissioners, and notaries public in recording districts where no authorized attorney resides may be allowed to prepare leases, bills of sale, mortgages, wills, deeds and contracts. The unauthorized practice of law shall also include the preparation and drafting of such other legal instruments as involve the determination of the legal effect of words, facts, circumstances and conditions, and, except as herein otherwise so provided, it shall also include the preparation of pleadings or the appearance as attorney or counsel in any court of the state by any person not an active member of the Alaska Bar; provided, that a law clerk for and under the supervision of an attorney may do any of the things above enumerated except that he shall not appear as attorney or counsel in any court of the state.

RULE 11

ADMISSION TO PRACTICE LAW

Section 1. Application for Admission. Every person desiring to be admitted to the Alaska Bar shall execute under oath and file with the Secretary of the

association his completed application in duplicate, with two complete sets of fingerprints and two 2″ x 3″ photographs showing a front view of head and shoulders and in such form as may be required by the Board of Governors. No application shall be granted unless the applicant is at the time of filing thereof a citizen of the United States over twenty-one (21) years of age, a graduate of a law school approved by the American Bar Association, or an attorney in good standing in the bar of another state or territory, and has been a resident of the state for at least sixty days before the date of application for admission by examination or by reciprocity. The date for the examination for admission or the date for certification by the Board that the person be admitted by reciprocity shall be at least ninety days after the application is made. Additional proof of any fact stated in the application may be required by the Board. In the event of the failure or refusal of an applicant to furnish any information or proof, or to answer any interrogatory of the Board pertinent to the pending application, the Board may deny the application. The form of application shall be provided by the Board and the contents thereof may be such as the Board may direct from time to time.

Section 2. Attorney Applicants. To be certified as an attorney applicant for admission to practice law in Alaska, a person shall:

(a) File an application as required by section 1 and pay the fees required by section 7.

(b) Comply with the citizenship, age and residence requirements set forth in section 1.

(c) Have been admitted to practice in another state, territory, or the District of Columbia, where the requirements for admission are substantially equivalent to those of Alaska. The applicant shall submit with his application a certificate from the clerk or other officer of the highest court of record of such state, territory, or the District of Columbia, in which he has previously been admitted, or from the clerk of the court of such state, territory, or District, by which attorneys are admitted, under the seal of the court showing that the applicant has been admitted to, and is entitled to practice in such state, territory, or District, and the date of his admission.

(d) Submit with his application satisfactory evidence that he has been actively engaged in the practice of law in such state, District, or territory, or has held a judicial position therein, or has been engaged in the teaching of law in an approved law school therein, and is at the time of filing his application, a member in good standing in the bar of such state, District, or territory.

(e) Be of good moral character. With his application, the applicant shall submit a certificate from the chief justice or other member of the highest court of the state, territory, or District, in which he has previously been admitted to practice, under the seal of the court, certifying that the applicant is in good standing at the bar of the court and is an honorable and worthy member of the profession, and if the applicant comes from a place where there is a local bar association, he shall also submit a recommendation from the president and secretary of such association. If either of these certificates cannot be procured because of lack of ac-

quaintance or lack of existence of a local bar association, then the applicant may present in lieu thereof a certificate of the judge of the highest court of record in the county or counties in which such appliiant was so engaged in practice or was holding such judicial or teaching position, and recommendations from at least three members of the local bar of the county where he last practiced. If, for sufficient reason, the applicant cannot obtain any of the recommendations required, the Board of Governors may accept other satisfactory proof of his character and reputation. The certificates required by this subdivision of this section shall not be conclusive upon the Board on the question of the moral or ethical fitness of the applicant. The Board shall cause an investigation to be made as to the fitness and character of such applicant and his record for professional conduct. If, upon a proper consideration of all the evidence in respect thereto, the Board is of the opinion that the applicant does not possess such moral and ethical qualifications, or such character and reputation as is consistent with the standards of the profession, the application shall be rejected.

(f) If the attorney applicant has [1] passed a state bar examination, [2] engaged in the active practice of law for at least five out of the previous six years before filing the application, excluding time spent in the military service of the United States, [3] is a graduate of a law school accredited by the American Bar Association, or is a graduate of any accredited law school if he has been engaged in the active practice of law for at least ten years, and [4] meets the character requirements established by the Board, such applicant need not take

an examination, provided he also satisfies the requirements of the foregoing subsections of this section.

(g) Unless exempt therefrom under the preceding subsection, the applicant must have passed an examination as prescribed in section 6 of this rule.

Section 3. Attorney Applicants; Fees. Fees for furnishing forms and for processing applications shall be established from time to time by the Board and shall be paid, together with the annual membership fee required of active members of the Alaska Bar, prior to processing an application.

Section 4. Examinations; Time and Place. Examinations for admission to the Bar shall be conducted at such times and places as the Board of Governors may designate.

Section 5. Examinations; Contents. The scope and contents of examinations for admission by general applicants, as well as attorney applicants, shall be as determined by the Board from time to time.

Section 6. Examinations; How Conducted. Examinations shall be conducted by or under the direction of the Board. For the purpose of conducting examinations, the Board shall appoint a committee of three or more active members of the Alaska Bar, and this committee shall be known as the Committee of Law Examiners. The Board shall furnish to this committee such clerical and other assistance as is deemed necessary. The Secretary of the Alaska Bar shall certify to this committee on or prior to seven days preceding the morning of the first day of each examination the names of the persons whose applications for examination have been approved by a majority of the Board. The Committee of Law

Examiners shall have charge of the conduct of the examination and shall, as soon as practicable after the completion thereof, certify to the Board the names of the persons who have been successful and the names of those who have been unsuccessful in the taking of such examination and the grades assigned to each.

Section 7. Examinations; Certification of Results; Admission; Oath; Payment of Membership Fees. The Board of Governors, upon receipt of the names certified by the Committee of Law Examiners, shall certify the successful applicants to the Supreme Court. Upon receiving the certification, unless objection is raised within five days, the Court will make an order admitting the applicant as an attorney at law in all of the courts of the state. A certificate of admission shall thereupon be given to the applicant by the Clerk of the Court. If an objection is raised, the sufficiency of the objection shall be determined by the Court within thirty days.

If the Court shall order the admission of the applicant, the applicant shall take the following oath before the Court or a justice thereof:

I do solemnly swear:

I am a citizen of the United States, and owe my allegiance thereto.

I will support the Constitution and laws of the United States of America and the laws of the State of Alaska.

I will abide by the Canons of Professional Ethics approved by the American Bar Association, and the rules of the Alaska Bar.

I will maintain the respect due to courts of justice and judicial officers.

I will not counsel or maintain any suit or proceeding which shall appear to me to be ill-founded, or any defense except such as I honestly believe to be debatable under the laws of the land, unless it be in defense of a person charged with a public offense. I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law.

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval.

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.

I will never reject from any consideration personal to myself, the cause with which I am charged.

I will never reject from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.

I am not now, and will not hereafter become a member of any party or organization having for its purpose or object the overthrow of the United States Government by force or violence, or the advocacy thereof.

So help me God.

This oath shall thereupon be reduced to writing, subscribed before the Court before whom it is taken in

duplicate. One copy shall be filed with the Court and one copy shall be forwarded to the Secretary of the Alaska Bar. The applicants shall pay the membership fee, if any, required of new members of the Alaska Bar for the current year, and shall thereupon be enrolled as an active member of that association, and upon such enrollment shall be entitled to practice law in this state.

Section 8. Examination; Failure. Any applicant who has failed to pass an examination shall be promptly notified by the Secretary. Any applicant who has taken the examination three times and failed shall not be permitted to take another examination except by special permission of the Board of Governors. The same application fee shall be charged for each additional examination.

Section 9. Special Investigations. The Board may refer any application to any existing committee of the Alaska Bar or to a special committee for the purpose of investigating and making recommendations on any matter in connection with said application. Any applicant may be required to appear before the Board or any committee of the Alaska Bar upon reasonable notice and submit to an examination touching any matters deemed by the Board relevant to a proper consideration of the pending application.

RULE 12

AMENDMENT

Section 1. Amendment of Rules. Proposals for amendment or abrogation of the Alaska Bar Rules may be presented to the Court by petition of the Board of Governors or by a resolution of the Alaska Bar ap-

proved by a vote of a majority of the members present at a meeting of the association.

Section 2. Amendment of Bylaws. The provisions of the Bylaws of the Alaska Bar shall be subject to amendment or abrogation by resolution adopted by vote of two-thirds of the members of the Board of Governors, or by action of the members of the Alaska Bar expressed through the referendum procedure defined in rule 7. When any change in the by-laws has been made, the Secretary shall publish notice thereof, including a copy of the amendatory resolution, in such manner as the Board may direct, and he shall file a certified copy thereof with the Clerk of the Supreme Court. A petition for review of any such change in the bylaws will be entertained by the Supreme Court if signed by 15% of the active members of the Alaska Bar and filed with the Clerk of the Supreme Court within sixty days after publication of notice of such change.

RULE 13

EFFECTIVE DATE OF RULES

The Rules of the Alaska Bar Association shall take effect on June 1, 1964.

EXHIBIT K.

SUPREME COURT OF ALASKA
941 Fourth Avenue
Anchorage, Alaska
May 27, 1964

Eugene Wiles, Esq.
2nd Vice-President
Alaska Bar Association
220 Central Building
Anchorage, Alaska

Dear Mr. Wiles:

Resolution No. 10, adopted by the Alaska Bar Association in convention on May 8, 1964, has come to the attention of the Court. It requests and directs the Board of Governors, all committees and appointees of the President to continue to operate and be governed by the Alaska Bar Act of 1955.

The resolution indicates no dates or period of time for which it is to be effective. Nevertheless, it seems to imply that the Alaska Bar Rules promulgated by the Court, with the effective date June 1, 1964, should be deliberately disregarded by the responsible officials of the Alaska Bar Association, at least for the ensuing year.

The Court is obliged to make clear its position which is that a deliberate failure to comply with the Alaska Bar Rules, as with any other order of this Court can, and under appropriate circumstances will, be held to constitute an act of contempt of Court.

Communications to the Court, statements before the legislature and the substance of other resolutions of the Bar convention, raise real doubts as to whether the le-

gal aspects surrounding promulgation of the Alaska Bar Rules have been fully examined. For example, Resolution No. 11 states, ". . . the rule making power of the Supreme Court does not extend to the creation of an Integrated Bar Association, but is restricted by the provisions of Section 15, Article IV of the Constitution of the State of Alaska to rules governing the administration of all courts and governing practice and procedure in civil and criminal cases in all courts. . . ." This entirely misconstrues the basis for the Court's authority and duty to promulgate the Bar Rules, which are not based on its constitutional power to make rules of practice and administration.

The Alaska Bar Rules result from the inherent power possessed by the Court to order the bar integrated. Such power has long been held to exist in all state supreme courts regardless of whether those courts happen to have the power to make rules of practice and administration. The Supreme Court of the United States upheld the right of Wisconsin to order the bar integrated only recently. See *Lathrop v. Donohue,* 367 U.S. 820, 6 L.ed 2d 1191 (1961). The Wisconsin court was not relying for its authority on any constitutional power to make rules of practice and procedure, for it had none. It was held to have the inherent power to order integration. The authorities on the subject are all to one effect. There is no minority view on this point. See *Petition of Florida State Bar Association,* 40 S.2d 902 (Fla., 1949); *In Re Sparks,* 101 S.W. 2d, 194 (Kentucky, 1937); *Ayres v. Hadaway,* 6 N.W.2d 905 (Michigan, 1942); *Integration of Bar Case,* 11 N.W. 2d 604 (Wisconsin, 1943). Alaska recognized the law in *In re Houston,* 378 P.2d 644 (Alaska, 1963).

Resolution No. 11 refers to "complete control of the Bar Association by the Supreme Court". Anyone who has read the Alaska Bar Rules through knows that they provide that the members elect the Board of Governors and the Board governs the Association. The Supreme Court has provided only basic guide rules to be certain that the organization is well adapted to its main functions of admitting and disciplining members. This is the same "control" that has been exercised by other state supreme courts in integrating their bar associations, except that some courts, such as Wisconsin, have promulgated the association bylaws as well as the rules. It is a "control" that has heretofore not been exercised in Alaska. The Board of Governors has operated free of any control for the reason that there was no supreme court and the legislature apparently was not inclined to attempt a job of regulation that required considerable specialized knowledge. Under Territorial status the Board of Governors enjoyed a status not held by any integrated bar association in the United States, and for good reason. It is generally recommended that no instrumentality of a state be entirely free of control by at least one of the three branches of the government.

Resolution No. 11 asserts that "complete" control of the Bar by the Supreme Court would give the Chief Justice control of the Judicial Council. This is totally unrealistic. In the first place the Supreme Court does not have "complete" control of the Bar under the rules.

Even if it had, which it definitely has not, it is not warranted to assume that the Supreme Court would or could force the Board of Governors to appoint three law members to the Council who would vote as directed by the Chief Justice. After all, the Chief Justice has been appointed by the Governor. If we assume no integrity or personal independence in any appointee we could speculate that since the Governor appoints three lay members and the Chief Justice he could dictate the names of judicial candidates to be submitted by the Council. A superficial analysis discloses the shallowness of this assertion.

Resolution No. 11 asserts that the Integrated Bar Act of 1955 has served the people well in regulating the legal profession. This Act served its purpose at a time when there was no Supreme Court and the legal profession was subject to no supervision whatsoever. It is no longer adequate. Furthermore, many of the powers delegated to the Board by the Act properly belong to the Supreme Court and passed to it by operation of law as soon as it came into existence. The Supreme Court has affirmatively asserted that it is assuming those inherent powers and responsibilities. It has no choice. The inherent powers and responsibilities are vested in it by operation of law since the Constitution has made it the high court of the state. The court could not abdicate or finally delegate those powers and responsibilities even if it chose to do so.

The Court has restated its views on the legal aspects of what are assumed to be the strongest reasons against the Alaska Bar Rules so as to be certain that no member of the Board of Governors misunderstands the Court's position.

The Court does not intend to "refrain" with respect to the Alaska Bar Rules, as urged in Resolution No. 11. The rules go into effect as ordered on June 1, 1964.

Sincerely yours,

s/ Buell A. Nesbett
Buell A. Nesbett
Chief Justice

Dist:
All Members Board of Governors
All Chairmen, District Grievance Committees

EXHIBIT L.

THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 68

Removing Members of the Board of Governors of the Alaska Bar Association

Senate Resolution No. 39, Third Legislature, First Session, passed by the Senate on March 19, 1963, requested this court, with the assistance of the Alaska Judicial Council and the Alaska Bar Association, to prepare rules placing the Alaska Bar Association in the judicial branch of the state government.

In response to the request of S. R. No. 39 the court proceeded to prepare a proposed set of rules and invited the participation of the Board of Governors of the Alaska Bar Association and of all members of the Alaska bar. In response to its invitation to participate the Supreme Court received only a request from the Board of Governors of the Alaska Bar Association to refrain from making rules for the government of the bar. The Alaska Judicial Council failed to agree on any recommendation in this respect.

The court in the exercise of its inherent power to integrate the bar, by Supreme Court Order No. 64, promulgated the Alaska Bar Rules, effective June 1, 1964 and provided therein that those members of the Board of Governors of the Alaska Bar Association on the effective date of the Rules should continue as members until the next annual meeting.

Thereafter one member of the Board of Governors, Charles J. Clasby, advised the court by letter of July 1, 1964, that he did not consider himself a member of the Board of Governors of the Association under the Alaska Bar Rules, and that if those Rules validly superseded the prior statute (AS 08.08) integrating the Alaska bar, he considered his office vacant;

Receipt of this letter gave the court concern as to whether other members of the present Board of Governors held like views and whether a Board of Governors of the Alaska Bar Association in fact existed under the Alaska Bar Rules;

The court thereupon requested from the members of the Board of Governors by letter dated July 13, 1964, a statement as to whether each intended to serve as a member of the Board of Governors under the Alaska Bar Rules and to advise the court in this respect by returning a questionnaire to the office of the chief justice not later than July 22, 2964;

All eight members of the Board to whom the questionnaire was sent have failed to return the answered questionnaire. Two members responded by letters which were equivocal, but which could only be reasonably interpreted as being an indirect refusal to serve as a member of the Board of Governors of the Alaska Bar Association, under the Alaska Bar Rules as promulgated by the court. In view of the foregoing the court has necessarily concluded that no member of the present Board of Governors intends to serve as a member of the Board under the Alaska Bar Rules.

Now, therefore, pursuant to these described circumstances IT IS ORDERED that:

Robert J. Annis
W. C. Arnold
Kenneth R. Atkinson
Charles J. Clasby
Richard Cole
Michael M. Holmes
Karl L. Walter, Jr.
Eugene Wiles
Robert H. Ziegler

are hereby removed as members of the Board of Governors and officers of the Alaska Bar Association as created by the Alaska Bar Rules, effective on June 1, 1964, by Supreme Court Order No. 64.

Dated: July 23, 1964

s/ Buell A. Nesbett
Chief Justice
s/ John H. Dimond
Associate Justice
s/ Harry O. Arend
Associate Justice

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EXHIBIT M.

THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 69

Ordering All Assets of
the Alaska Bar Association
taken into the custody of
the Supreme Court

All members of the Board of Governors of the Alaska Bar Association, as created and organized under AS 08.08, have been removed from office by Supreme Court Order No. 68 dated 23 July 1964 for the reasons therein stated.

Since it is necessary that the business of the Alaska Bar Association continue to be performed without interruption pending election or appointment of a successor Board of Governors,

IT IS ORDERED that: all assets of the Alaska Bar Association, including but not limited to the cash on hand, deposits in banks, books of account, files, records, equipment, and personal property of every kind and description of the Alaska Bar Association shall be and are hereby transferred to the temporary possession, custody and control of this court pending election or appointment of a successor Board of Governors.

Dated: July 23, 1964.

s/ Buell A. Nesbett
Chief Justice

s/ John H. Dimond
Associate Justice

s/ Harry O. Arend
Associate Justice

Distribution:

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EXHIBIT N.

THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 71

Removing Peter J. Kalamarides as Executive-Secretary of the Alaska Bar Association and as Chairman of the Admissions Committee and appointing Ernest Z. Rehbock as Executive Director-Trustee of the Alaska Bar Association and as Chairman of its Admissions Committee.

It Is Ordered:

Peter J. Kalamarides is removed as Executive-Secretary of the Alaska Bar Association and as Chairman of the Admissions Committee.

Ernest Z. Rehbock is appointed Executive Director-Trustee of the Alaska Bar Association and Chairman of its Admissions Committee.

As Executive Director-Trustee Ernest Z. Rehbock shall refer to this court for decision all matters that would heretofore under the Alaska Bar Rules, have come before the Board of Governors or officers of the Alaska Bar Association for decision. The Executive Director-Trustee shall then do or cause to be done all of the things required to be done by the Board of Directors or officers of the Alaska Bar Association pursuant to the Alaska Bar Rules.

To the extent that they are inconsistent with the above arrangement, the Alaska Bar Rules are superseded by this Order for so long as it shall remain in effect.

Effective as of July 23, 1964.

s/ Buell A. Nesbett
Chief Justice

s/ John H. Dimond
Associate Justice

s/ Harry O. Arend
Associate Justice

Distribution:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965
No. 88

In the Matter of Disciplinary Proceedings Against
NEIL S. MACKAY, an Attorney at Law

Petitioner.

Memorandum on Behalf of The Supreme Court of Alaska

The Attorney General of Alaska has taken the position that he has no authority to act with respect to a case involving the discipline of a member of the Bar. The finding of the Board of Governors of the Alaska Bar Association favorable to Petitioner was reviewed and overruled by the judgment of the Supreme Court of Alaska and accordingly the Board of Governors has no interest in opposing the Petition for Certiorari. Unless the Supreme Court of Alaska responds to the Petition, there will be no reply to it.

In view of the precedents for a reply to a Petition for Certiorari by a Court since *Ex parte Wall,* 107 U.S. 265, 27 L.ed 552 (1883) and in view of statements made in the Petition which are not justified by the record, the Supreme Court of Alaska believes that this Court should have the benefit of a response to the Petition and therefore it has authorized counsel to file this Memorandum on its behalf.[1]

[1] The time for the filing of this reply was extended until June 29, 1965.

Its reply is not designated a Brief in Opposition because the Supreme Court of Alaska takes no position as to whether the Petition should be granted or denied.

The unanimous opinions of the Supreme Court of Alaska finding Petitioner guilty of improper professional conduct, suspending him from the practice of the law for one year and rejecting the technical objections to its jurisdiction are not in conflict with any opinion of this Court. Nor are they in conflict with that of any Circuit Court of Appeals or of any Federal District Court.

STATEMENT

The Supreme Court of Alaska found in its opinion of October 26, 1964, that Petitioner, an experienced member of the Bar in Anchorage, Alaska, had taken advantage of his client, an illiterate Finnish woman, and as a consequence had enriched himself at her expense in the amount of $7,500.00 without reference to the legal fees he had received for services performed as her attorney. (Pet. App. p. 10-20). The Supreme Court of Alaska directed that Petitioner be disbarred. (Pet. App. p. 20).

Upon Petition for Rehearing, in which Petitioner represented to the Court a willingness to make restitution, the Court in an opinion filed January 30, 1965, reduced Petitioner's punishment from disbarment to suspension from the practice of law for a period of one year provided that reinstatement be conditional upon his payment to his client or, if appropriate, to the State of Alaska[2] of the sum of $7,500.00. (Pet. App. 31, 33).

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[2] The State of Alaska has a claim against Petitioner's client of over $6,000.00 by reason of the fact that since her business transactions with Petitioner she has been on State relief. (Pet. App. 32).

The Alaska Bar Association commenced this disciplinary proceeding in 1961 by filing a complaint against Petitioner charging him with misconduct in his office as an attorney by cheating or over-reaching his client. (Pet. App. 1). The case was heard in September, 1961, before a trial committee of the Alaska Bar Association in conformity with Rules 8 and 9 of Rules of Procedure Relative to Disbarment (Pet. App. 2, 3). After the taking of testimony, which was transcribed, and the arguments of counsel for Petitioner, a majority of the trial committee concluded that there was a "deficiency in conduct on the part of the accused as over-reaching of the client" and recommended that Petitioner be suspended from the practice of law "for not more than six months as the Board of Governors feels appropriate." (Pet. App. 2).

This finding of the trial committee was reviewed by the Board of Governors of the Bar Association on the transcript of the testimony taken before the trial committee at hearings on November 30, 1961, and December 1, 1961, which included arguments of counsel for Petitioner. The Board voted 4 to 2 to concur in the dissenting opinion of a member of the trial committee. (Pet. App. 3, 4). The Board dismissed the complaint. Since then the original transcript of the testimony taken before the trial committee has been missing. (Pet. App. 5).

A statute in effect at the time the trial committee and the Board of Governors acted in this matter provided:

> "Upon finally determining any cause involving the discipline, disbarment, suspension or reinstatement of a member of the Alaska Bar, the Board of Governors *shall certify its findings and recommendations thereon to the Supreme Court of Alaska.* Upon receiving the findings and recommendations, the Court shall, within thirty days thereafter, issue an order of disbarment,

suspension, reinstatement, dismissal or otherwise, in full accordance with the recommendations of the Board." (Pet. App. 4). Emphasis added.

It is undisputed that the Board of Governors did not certify its findings and recommendations to the Alaska Supreme Court as required by the statute or otherwise make them known to the Court.

This case and its disposition by the Board of Governors did not come to the attention of the Supreme Court of Alaska until August, 1964, when it was referred to in a letter of the Attorney General of Alaska to the Court. (Pet. App. 32). The Court promptly notified Petitioner that it proposed to take cognizance of the charges against him and that he would be accorded a hearing on September 12, 1964. (Pet. App. 54). Counsel for Petitioner filed motions to preclude review by the Court of the administrative disciplinary proceeding and argued the case before the Court on September 24, 1964, claiming lack of jurisdiction, *res adjudicata* and the absence of a complete record.[3]

In its opinion of October 26, 1964, the Supreme Court of Alaska held that, insofar as the statute attempted to impose upon the Court the mandatory duty of issuing an order in full accordance with the recommendations of the Board of Governors, it was unconstitutional as an invasion of the inherent powers of the Court to discipline members of the Bar.

The inherent power of a state supreme court to discipline members of the Bar as officers of the courts, has been

[3] Since the original transcript was not available, the case was heard by the Court upon an office copy of the three volume transcript of testimony forwarded to the Supreme Court of Alaska by the official court reporter for the United States District Court for the District of Alaska who had recorded the proceedings before the trial committee. (Pet. App. 41, 42).

recognized by the Supreme Courts of numerous states.[4] The Court's conclusion that it could exercise its inherent power with respect to the discipline of attorneys upon its own initiative has also been recognized by the Courts of other states. *In re Hallinan,* 43 Cal. 2d 243, 272 P.2d 768, 775 (1954); *In re Association of Bar,* 222 App. Div. 580, 227 N.Y.S. 1, 8-10 (1928). The court's determination that its constitutional powers with respect to the discipline of attorneys could not be defeated by the legislative branch of goverment has been established by the Supreme Courts of California, Georgia, Missouri and Utah.[5] This Court has also recognized that state courts have the inherent power to discipline members of the Bar. *Martin* v. *Walton,* 368 U.S. 25 (1961). See also *Saier* v. *State Bar,* 293 F.2d 756, 759, 760 (6th Cir. 1961) cert. denied 368 U. S. 947 (1961).

I

Petitioner's Contention That The Supreme Court Of Alaska Deprived Him Of His Right To Have Federal And Constitutional Questions Decided By The United States District Court For Alaska

There has been a pending suit in the United States District Court for the District of Alaska on behalf of the

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[4] *In re Sullivan,* 64 Ariz. 337, 170 P.2d 614, 615 (1946); *In re Accusation by Walker,* 32 Cal. 2d 488, 196 P.2d 882 (1948); *In re Hallinan,* 43 Cal. 2d 243, 272 P.2d 768, 775 (1954); *In re Lavine,* 2 Cal. 2d 324, 41 P.2d 161, 162, modified on another point 2 Cal. 2d 324, 42 P.2d 311 (1935); *People ex rel. Colorado Bar Ass'n* v. *Irwin,* 60 Colo. 177, 152 Pac. 905, 908 (1915); *Application of Harper,* 84 So. 2d 700, 706, 54 A.L.R.2d. 1272 (Fla. 1956); *In re Trask,* 46 Hawaii 404, 380 P.2d 751, 758 (1963); *Martin* v. *Davis,* 187 Kan. 473, 357 P.2d 782, 787-88 (1960); *In re Richards,* 333 Mo. 907, 63 S.W.2d 672, 674 (1933); *In re Watson,* 71 Nev. 227, 286 P.2d 254, 53 A.L.R.2d. 301 (1955); *In re Farris,* 229 Ore. 209, 367 P.2d 387, 397 (1961); *Ruckenbrod* v. *Mullins,* 102 Utah 548, 133 P.2d 325, 330, 144 A.L.R. 839 (1943); and *In re Bruen,* 102 Wash. 472, 172 Pac. 1152, 1154 (1918).

[5] *In re Lavine,* supra; *DeKrasner* v. *Boykin,* 54 Ga. App. 29, 186 S.E. 701, 703-04 (1936); *State ex rel. Clark* v. *Shain,* 343 Mo. 542, 122 S.W. 2d 882 (1938); *Ruckenbrod* v. *Mullins,* supra.

Alaska Bar Association and its members against the Supreme Court of Alaska and its members (1) to invalidate court rules, known as the Alaska Bar Rules, effective June 1, 1964, regulating the Alaska Bar Association, an integrated Bar deemed an instrumentality of the State of Alaska and (2) to invalidate orders of the Supreme Court of Alaska of July 23, 1964, imposing temporary sanctions upon the Board of Governors of the Association by suspending the members of the Board and appointing a temporary trustee to conduct the affairs of the Association. These orders were issued after the members of the Association at its convention in May, 1964, had instructed its Board of Governors to refuse to comply with the Alaska Bar Rules and the members of the Board of Governors had indicated to the Alaska Supreme Court that they would not comply with them. The temporary sanctions which were imposed to vindicate the Court's authority were deemed less severe than the alternative of contempt citations.

When counsel for the Association, its Board of Governors and members notified the Court that they would comply with the new rules unless and until they were declared invalid by a court of competent jurisdiction, the Supreme Court of Alaska on September 8, 1964, revoked the take-over orders, terminated the trusteeship and directed that the funds, books and records of the Association be restored to it.

A summary of the proceedings before the 3 judge Federal District Court is set forth in Appendix A.

Any parties disappointed with the final decision in the 3 judge District Court case may have the right to a direct appeal to the Supreme Court under 28 U.S.C. Sec. 1253.

Petitioner contends that the Supreme Court of Alaska should have abstained from proceeding with his disciplinary

case pending decision of the Federal District Court case. Petitioner filed no motion requesting the Alaska Supreme Court to abstain in his disciplinary case before the opinion of that court deciding the case on October 26, 1964 (Pet. App. 55-57). Nor did Petitioner even make such a contention in his Petition for Rehearing. (Pet. App. 36-41).

On the merits there appears to be no substance to the contention.

1. The complaint and the amended complaint in the Federal District Court case made no reference to the Mackay case.

2. The Federal District Court had no jurisdiction with respect to a disciplinary case pending for decision before the Supreme Court of Alaska.

3. The legal questions raised by Petitioner in his motions to dismiss before the Supreme Court of Alaska related primarily to questions of state law, i.e., whether the decision of the Board of Governors of the Alaska Bar Association favorable to Mackay was conclusive, whether the provisions of a statute imposing the mandatory duty upon the Supreme Court of Alaska to accept and implement ~~any findings~~ of the Board of Governors in disciplinary cases was valid under the Constitution of Alaska or invalid as a violation of the inherent powers of the Alaska Supreme Court, whether the decision of the Board of Governors was *res adjudicata*, whether the court could hear the case upon a copy of the transcript.

4. The Supreme Court of Alaska could not abdicate its authority and responsibility to decide a disciplinary case before it because of the pendency in a Federal District Court of a very different case involving the validity of the

Alaska Bar rules regulating the Bar Association and the validity of the take-over orders.

5. Federal District Courts in appropriate circumstances are required under the *Pullman* doctrine to abstain to enable state courts to determine authoritatively important state law questions. The doctrine presupposes the desirability of the state courts, which may only determine finally and authoritatively state law questions, deciding such questions for the benefit of the federal courts. Accordingly only the state supreme court could authoritatively and finally determine that under the Constitution of Alaska the provisions of the statute requiring the court to accept any recommendation of the Board of Governors of the Bar Association in a disciplinary case was invalid.

Petitioner relies upon *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964). There a suit was filed in a Federal District Court to invalidate a state statute. The Federal court abstained under the *Pullman* doctrine until questions of state law had been authoritatively determined in the state courts. After a decision of the Supreme Court of the State had been rendered sustaining the validity of the statute, Plaintiffs attempted to return to the Federal District Court rather than seek certiorari to this Court. The sole question involved in the District Court and in this Court was whether there had been an adequate reservation by plaintiffs of an election to return to the District Court for the determination of federal questions.

The Mackay case involved charges of improper conduct before a trial committee of the Alaska Bar Association, review by the Board of Governors and later review by the Alaska Supreme Court. The case could not have been

originally instituted in a Federal District Court, and, of course, there was no abstention by a Federal District Court under *Pullman* as in *England.*

The statement in the Petition that the rule of *England* requires a state court to abstain from decision if a litigant chooses a federal court to decide federal and constitutional questions (Pet. App. 15) is not in accord with the decision in that case.

II

The Contention Of Petitioner That He Was Deprived Of Due Process Because All The Members Of The Supreme Court Of Alaska Were Biased Against Him

The members of the Supreme Court of Alaska disclaimed that they were biased or prejudiced against Petitioner and disclaimed that they had any hostile feeling or spirit of ill will toward him (Pet. App. 26). In its opinion the Court pointed out that under Alaska law there was no other court, which had jurisdiction to review the administrative action of the trial committee and of the Board of Governors.

If a claim of bias on the part of all the members of a Supreme Court were sufficient to disqualify them, when no other court can act, the exercise by the Court of its constitutional and statutory jurisdiction could readily be frustrated. The rule of disqualification must yield to the demands of necessity and judges may act in a proceeding in which they might otherwise be disqualified if their disqualification would destroy the only tribunal which can act. chooses a federal court to decide federal and constitutional *Evans* v. *Gore* 253 U.S. 245, 247 (1920); *Tumey* v. *Ohio* 273 U.S. 510, 522 (1926); *Brinkley* v. *Hassig* 83 F.2d 351, 357 (10th Cir. 1936).

III

The Contention That Petitioner Was Deprived Of Due Process Because The Supreme Court Of Alaska Utilized A Copy Of The Transcript Of Evidence And Not The Original Transcript Which Was Not Available

(a) The extensive record before the Alaska Supreme Court filed in this court appears to contain the complete verbatim testimony of all witnesses. The record also includes copies of the pleadings which had been obtained from a member of the trial committee. Since the Board of Governors heard no witnesses and overruled the recommendation of the trial committee upon the record made before the trial committee, it would appear that the Alaska Supreme Court in overruling the Board had in actuality the same record before it as the Board of Governors.[5a]

The Petition states "An appellate court reviews only a certified transcript of the evidence taken at a formal hearing." (Pet. App. 16). The motions submitted to the Alaska Supreme Court complained of the "limited" record before the Court but the motions did not show that the copy of the transcript before the Alaska Supreme Court was incorrect or inadequate or prejudicial in any particular respect. (Pet. App. 55-57). Petitioner did not elect to submit any testimony before the Supreme Court of Alaska nor did he move to supplement the record before that Court. If the loss of the original record of a case below precluded review by an appellate court in a civil proceeding such as this, it would provide an incentive to a party or an administrative tribunal to destroy the original record. Such a dangerous doctrine has not been accepted by any court anywhere.[6]

[5a] An index of the record is contained in Appendix B.

[6] Even in a criminal case if a record can be prepared in such a manner as to enable the appellate court to pass on the questions involved, the impossibility of securing a verbatim transcript certified by the official court reporter does not preclude review. *People* v. *Chessman*, 35 Cal. 2d 455, 218 P.2d 769, 19 A.L.R. 2d 1084 (1950).

The general rule is that an appeal can be heard on a record prepared without literal compliance with court rules where such compliance has become impossible, where the record presented is adequate to enable the appellate court to pass on the questions involved and where the party complaining of the lack of literal compliance makes no showing that the record presented contains prejudicial error. *People* v. *Chessman,* 35 Cal. 2d 455, 218 P.2d 769, 19 ALR 2d 1084 (1950) cert. denied 340 U. S. 840; 4 Am. Jur. 2d, *Appeal and Error.*

Alaska Supreme Court Rule 9(k) and Federal Civil Rule 75(n) provide for appeals when *no* stenographic record was made of the proceedings at the hearing below, thus negativing Petitioner's claim that an appeal can only be heard upon a certified record. The death of a court reporter prior to completion of the lower court record has consistently been held to be insufficient ground for a new trial when any other method of securing the desired record is available. For this purpose appellate courts have utilized the notes of trial counsel, recollection of the evidence by trial judge and counsel, and notes of the deceased reporter transcribed by another reporter.

Chessman v. *Teets,* 350 U.S. 3 (1955), relied upon by Petitioner, held that an application for *habeas corpus* in a criminal case should not have been summarily dismissed when the petition charged that the prosecuting attorney had participated in the preparation of a fraudulent transcript of the testimony.

(b) The Alaska Supreme Court did not deny Petitioner the right to a trial *de novo* because Petitioner did not request or claim such a right. Petitioner's Motion to Dismiss merely generalized that the record was too inadequate for the Court to act without a new trial. (Pet. App. 55). It was not until *after* the Alaska Supreme Court had decided the

case that in his Petition for Rehearing Petitioner asserted that, if he "had been afforded a trial *de novo* he could have overcome by competent evidence the charge of irregularities before the Board." (Pet. App. 38). If this assertion be deemed a request for a trial *de novo*, it came too late.

(c) Petitioner claims that he was denied the right to be confronted with witnesses by reason of the utilization by the Alaska Supreme Court of the copy of the transcript of testimony taken before the Trial Committee. (Pet. App. 17, 18). The transcript shows that counsel for Petitioner participated in the extensive hearings before the trial committee, submitted testimony and cross-examined witnesses. Thus, Petitioner's right to be confronted by witnesses was protected.

IV

Petitioner's Contention That The Alaska Bar Rules Were Given Retroactive Effect.

Petitioner says that the Alaska Bar Rules, which provided for direct review by the Alaska Supreme Court of trial committee disciplinary recommendations were given retroactive effect. (Pet. App. p. 18). These procedural rules were in effect from June 1, 1964 until they were superseded by new rules agreed upon by the Supreme Court and the Bar Association and provided for in a Court Order of January 29, 1965. Thus they were in effect when the Alaska Supreme Court took cognizance of the case, held the hearing and decided the case. An interpretation of the Alaska Bar Rules, by the Alaska Supreme Court, relative to procedural matters would appear to involve no more than a state question.

Even if these Rules had not been in effect, the Alaska Supreme Court had authority to review the administrative

recommendation of the Board of Governors when (1) the Board of Governors did not certify its recommendation in the *Mackay* case to the Alaska Supreme Court in violation of the statute and (2) the provision of the statute requiring the state Supreme Court to accept and implement *any* recommendation of the Board of Governors was invalid under Alaska law—as the Alaska Supreme Court has held.

V.

Petitioner's Contention That He Was Deprived Of Due Process Because The Supreme Court Of Alaska Was Estopped To Take Disciplinary Action Against Him Since He Had Been Exonerated By The Board Of Governors Of The Alaska Bar Association.

The general rule is that a bar association may only *recommend* disciplinary action; final action can only be taken by a state supreme court. In matters of discipline of lawyers, a state bar association is merely an arm of a state supreme court, and such court retains its inherent power to take final action. The court is not bound to accept the facts found by the state bar; it exercises original jurisdiction and may treat the administrative findings of a state bar association as it would treat the findings or recommendations of a referee or master. By whatever name a disciplinary proceeding may be called, it is in essence the initial stage of a court action.[7] Accordingly the Supreme Court of Alaska was not bound by a finding of the Board of Governors which was no more than a recommendation.

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[7] *Brotsky* v. *State Bar*, 57 Cal. 2d 287, 368 P.2d 697, 94 ALR 2d 1310; *Re Petersen*, 208 Cal. 42, 280 P. 124 (1929); *Johnson* v. *State Bar*, 4 Cal. 2d 744, 52 P.2d 928 (1935); *Re Edwards*, 50 Idaho 238, 294 P. 847 (1930); *Re Gibson*, 35 N.M. 550, 4 P.2d 643 (1931); *Re Kitchen* 68 P.2d 1068 (Or. 1937); *Re Smith*, 134 P.2d 956 (Or. 1943); *Re McCullough*, 97 Utah 533, 95 P.2d 13 (1939); *Re Van Bever*, 55 Ariz. 368, 101 P.2d 790 (1940); *Re Christopher*, 181 Okla. 323, 73 P.2d 851 (1937).

A case relating to the discipline of a member of the bar is very different from one involving the disciplinary function of a state board of medical examiners or dental examiners because the members of those professions are not persons who are officers of a court and are not under the control and regulation of the court. *Re Bruen,* 102 Wash. 472, 172 P. 1152 (1918).

CONCLUSION

The Supreme Court of Alaska takes no position as to whether the Petition for a Writ of Certiorari should be granted or denied.

Respectfully submitted,

GEORGE COCHRAN DOUB,
BARRY D. BERMAN,
Attorneys for the Supreme Court of Alaska

Of Counsel:

WEINBERG & GREEN.

June, 1965.

Appendix A

SUMMARY OF PROCEEDINGS IN THE FEDERAL DISTRICT COURT CASE

Upon the institution of this suit referred to in the Memorandum at p. 5 counsel for defendants filed a motion to dismiss for lack of jurisdiction on various grounds including (1) there was no case or controversy arising under the laws of the United States, (2) the District Court had no authority to review, modify or reverse orders of a state Supreme Court, (3) the validity of the orders of the state supreme court were only subject to review by the Supreme Court of the United States, (4) when a Court, whether federal or state, takes possession of a res, the property is withdrawn from the reach of the other and, since the state supreme court had first acquired control of the res, the District Court had no authority to exercise any power over it, (5) this suit was in substance an action by the Bar Association, an instrumentality of the State of Alaska, against the Alaska Supreme Court, another branch of the state government, and accordingly the suit could not be maintained in the Federal District Court and (6) the Supreme Court of Alaska and its members could not be sued for their official acts. Counsel for defendants also filed a motion to abstain under the *Pullman* doctrine to enable the plaintiffs to obtain an authoritative decision of the Alaska Supreme Court as to the questions of state law involved.

At an extensive hearing in Anchorage in October, 1964, the 3 judge Federal District Court overruled the motions but reserved decision as to all other legal issues.

The Court urged the parties and their counsel to seek a solution to this unfortunate controversy which so obviously was detrimental to the administration of justice in Alaska. There ensued settlement conferences in Juneau on December 17 and 18, 1964, between the members of the Supreme Court of Alaska, the members of the Board of Governors of the Alaska Bar Association, counsel for all plaintiffs in the District Court proceeding and an American Bar

Association mediation committee consisting of Chief Justice MacAllister of Oregon, Chief Justice Rosellini of Washington and former Dean Alfred J. Schweppe.

As a result of the meetings it was agreed at Juneau that, subject to the approval of the Bar, the Supreme Court would approve new rules patterned after those of the States of Oregon and Washington which were agreed upon, and would jointly sponsor with the Bar Association new legislation with respect to the Association. At the conclusion of the meetings a stipulation providing for the dismissal of the District Court case upon completion of the conditions subsequent was signed by the Chief Justice of the Supreme Court and the President of the Bar Association.

The settlement terms were then submitted to the members of the Alaska Bar in a referendum and ratified by a vote of 94 to 54. In reliance upon the settlement agreement the Chief Justice and the President of the Bar Association jointly recommended to the Legislature the agreed upon legislative bill and by Order dated January 29, 1965, effective February 8, 1965 the Supreme Court revoked the Alaska Bar Rules and approved the new rules agreed upon at the Juneau meetings.

Thereafter the Bar Association attempted to repudiate the settlement upon various grounds: (1) the members of the Board of Governors had acted in their individual capacity at the meetings in Juneau and not as an official Board, (2) the new rules agreed upon required later official Board action, (3) at a later special meeting of the Bar held on short notice in Anchorage a majority present had voted to continue the litigation and (4) a second referendum had resulted in a majority vote of the members of the Bar voting to continue the litigation.

Counsel for the Supreme Court of Alaska filed motions to dismiss on the ground that the Juneau settlement agreement was valid and binding and that the issues in the Federal Court case had become moot. Counsel for plaintiffs

in their answer and briefs in opposition asserted the points made above.

At the outset of hearings in the District Court in Anchorage June 14-17, 1965, the Court heard a motion of defendants to strike a supplemental complaint which sought to have the court review the decision of the Alaska Supreme Court in the Mackay disciplinary case. This motion was granted. A supplemental complaint filed by Mackay a few days before the hearing for the same purpose without leave of court was stricken.

Thereafter plaintiffs abandoned of record all contentions made above but asserted that there was an inconsistency between paragraph 3 of the Order of the Alaska Supreme Court dated January 29, 1965, and a sentence in Rule 1, Section 25. Paragraph 3 of the Order provided that disciplinary cases[1] pending at the effective date of the Order, i.e. February 8, 1965, should be processed in accordance with Rule 9 of the Alaska Bar Rules. Section 25 of Rule 1 provided that Rule 1 should apply to all pending matters of misconduct so far as may be practicable.

Although the inconsistency had not been called to the attention of the Alaska Supreme Court before June 14, 1965, the District Court expressed the view that the Alaska Supreme Court should correct it by revoking paragraph 3 of its Order. Since it was desirable that there be no uncertainty as to how a disciplinary case pending on the effective date of the order should be processed, the Alaska Supreme Court authorized counsel to advise the District Court that it proposed to issue an order in the following form revoking paragraph 3 of its January 29, 1965, Order and a certified copy of the Order would be filed with the District Court:

[1] The testimony at the hearings indicated that there was only one such case and it was pending before a trial committee.

"THE SUPREME COURT OF THE STATE OF ALASKA

Order No. 76

"WHEREAS, this Court included Paragraph 3 in its Order No. 75 at the suggestion of the President of the Alaska Bar Association; and,

"WHEREAS, it was called to the attention of this Court for the first time on June 14, 1965, that there is an inconsistency between the provisions of Paragraph 3 of Order No. 75 and a provision of Rule I, Section 25 as approved by Paragraph 2 of Order No. 75; and,

"WHEREAS, the inconsistency could lead to uncertainty in the processing of disciplinary cases pending on the effective date of Order No. 75;

"NOW THEREFORE, it is ORDERED that Paragraph 3 of Order No. 75 is rescinded as of the date of Order No. 75.

DATED: June 16, 1965.

/s/ BUELL A. NESBETT,
Chief Justice,

/s/ J. A. RABINOWITZ,
Associate Justice,

/s/ JOHN H. DIMOND,
Associate Justice."

When so advised by counsel for the Alaska Supreme Court, the District Court announced that upon receipt of a certified copy of the Order the case would be dismissed.

On June 16, 1965, the Alaska Supreme Court promulgated the order and on June 25, 1965 a certified copy was filed with the District Court.

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(Alaska Bar Association before the Board of Governors)

3 Volumes

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FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 6 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965
No. 88

In the Matter of Disciplinary Proceedings Against
NEIL S. MACKAY, an Attorney at Law,

Petitioner.

Motion to File Supplement to Petition for a Writ of Certiorari, and Supplement to Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 88

In the Matter of Disciplinary Proceedings Against NEIL S. MACKAY, an Attorney at Law,

Petitioner.

Motion to File Supplement to Petition for a Writ of Certiorari to the Supreme Court of Alaska.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Neil S. MacKay moves and respectfully applies for an order allowing him to file a Supplement to the Petition for Certiorari to the Supreme Court of the State of Alaska now pending before this Court. The Supplement alleges facts which have occurred since the Petition was fiied, which facts substantially affect the right of MacKay to protection from order of the Alaska Supreme Court which deprived MacKay of rights to which he is entitled under the Constitution of the United States. The Supplement states an additional ground for review by this Court: That Neil S. MacKay has been and is being deprived of equal protection of the laws of Alaska by an order of the Supreme Court of Alaska.

This motion is based on the facts alleged in the Petition, the facts alleged in this Supplement, and the record of the Supreme Court of Alaska, on file with the Clerk of the Supreme Court of the United States.

Dated: June 3, 1966.

JOSEPH A. BALL,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1965
No. 88

In the Matter of Disciplinary Proceedings Against NEIL S. MACKAY, an Attorney at Law,

Petitioner.

Supplement to Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska.

Facts Which Support the Motion to Supplement Petition for Certiorari.

The Alaska Supreme Court adopted rules of procedure, effective January 29, 1965, which, if applied in the matter of MacKay would require that court to set aside its decision and order. The action in the United States District Court between the Alaska Bar Association and others, as plaintiffs, and the members of the Alaska Supreme Court, as defendants, has been dismissed pursuant to the stipulation of all parties. Neil MacKay petitioned the Alaska Supreme Court to reconsider its decision and order in the light of the change in the procedural rules. The Alaska Supreme Court has refused to reconsider its decision. (Opinion, May 13, 1966.) These facts and other facts relevant should be presented to this court by supplement for the following reasons:

1. Certain questions raised in the petition for certiorari are now moot;
2. The facts alleged in this supplement to the petition for certiorari strengthen the claim of the petition that he has been deprived of the right to practice law without due process of law;
3. These facts provide an additional reason why certiorari should be granted, as petitioner has been refused the equal protection of the laws of Alaska.

Jurisdiction to Consider the Additional Question Raised in This Petition.

Petitioner raised the additional question stated in this supplement arising under the Constitution of the United States by petition for reconsideration to the Supreme Court of Alaska, filed in that court on August 19, 1965.

Events Which Have Occurred Since Petition for Writ of Certiorari Was Filed.

(a) Review of facts which are alleged in petition for certiorari.

In the petition for certiorari, petitioner described the unlawful seizure of property from the Alaska Bar Association, and the removal of its officers which caused the association and 165 of its members to file suit in the U.S. District Court for Alaska against the individual members of the Supreme Court of Alaska. While the suit was pending, the Alaska Supreme Court revived old charges against one of the plaintiffs, Neil S. MacKay, and ordered him disbarred. On November 5, 1964, the Supreme Court of Alaska ordered a rehearing in the matter of the petition of MacKay. While the matter was pending on rehearing in the Supreme Court of

Alaska, new rules of procedure were adopted by the Alaska Bar Association and these rules were approved and adopted by the Supreme Court of Alaska as court rules. (Order No. 75, dated January 29, 1965.)

(b) Facts not alleged in the petition for certiorari.

The Juneau Meeting.

The rules of procedure adopted and approved by the Supreme Court of Alaska on January 29, 1965, were the result of a settlement between the bar and the members of the Alaska Supreme Court. On December 16 and 17, 1964, the members of the board of governors of the statutory bar met with the members of the Alaska Supreme Court in Juneau, Alaska. Alfred J. Schweppe of Seattle, Washington, Chief Justice Hugh J. Rossellini of the State of Washington, and Chief Justice William N. McAlliste of the State of Oregon, acted as mediators at the request of the American Bar Association. The contending parties adjusted all of their differences at this meeting. They agreed that the court would recognize the statutory bar as the integrated bar of Alaska; that the court would rescind the rules promulgated by Rule No. 64, on June 1, 1964, which purported to integrate the bar by court rule and purported to govern the bar by court order.[1] They also agreed that the Alaska Bar Association would adopt rules of procedure pertaining to discipline and admissions which would be subject to the approval of the court. If adopted, the rules would be rules of the Supreme Court of Alas-

[1]Thomas Stewart, administrative director of the Alaska court system who was present at the Juneau meeting testified that Chief Justice Nesbett stated at the Juneau meeting the Alaska Bar Rules (Rule 64) would be rescinded. [p. 48, line 23, to p. 49, line 1, Tr. of Proceedings before Federal District Court.]

ka. Rules of procedure were drafted at Juneau. The parties then entered into a stipulation to dismiss the action in the Federal District Court as soon as the bar and the court had approved the Juneau rules. [Exs. A and B, Motion to Defer Decision.]

Throughout the discussions at Juneau, the Bar had insisted that there was no need for the court to review a dismissal of a charge against a lawyer after hearing by a board of governors. The mediators advised the group that this was in accordance with procedures followed in the states of Washington and California.[2] Section 12 of Rule I of the Alaska Bar Rules was the product of this discussion.

This rule made some change in the statutory procedure which had been in effect in Alaska under the Integrated Bar Act. The statute required that the board certify the record to the Supreme Court of Alaska after dismissal but the court was required to enter the dismissal in accordance with the board's findings. (§6, Chap. 178 SLA 1960.) Section 12 of the new rules prepared at Juneau provided that the board itself should make "findings, conclusions and its recommendations as to whether the formal complaint shall be dismissed . . ." and in the event of dismissal "the record of the proceeding shall be retained in the office of the Association. . . ." [Ex. B, Motion to Defer Consideration.] The rule thus approved the procedure which had been inadvertently followed by the board of

[2]Alfred J. Schweppe testified before the U.S. District Court on June 16, 1965, that Chief Justice Nesbett suggested that the court should review a dismissal of a complaint which had been dismissed after a divided vote of the board of governors. The members of the board disagreed. After a caucus, "the court instructed me to say that it would not press its position any further." [p. 41, Tr. of Proceedings, U.S. District Court.]

governors of the Alaska Bar Association in the matter of MacKay. After dismissal of charges against MacKay on December 1, 1961, the record was not forwarded to the court. To this day the Supreme Court of Alaska has no certified record of proceedings before either the trial committee or the board of governors in the matter of MacKay.

The Alaska Bar Association fully complied with the agreement of settlement. The rules prepared at Juneau were adopted without change by a plebiscite of the members conducted January 15, 1965. On January 29, 1965, the court approved the Juneau rules (Order No. 75) with one qualification: only future cases would be governed by the new rules; pending cases would be subject to the old procedures, which had been the subject of dispute (Order No. 64, June 1, 1964).

This was not a full compliance with the agreement. The Juneau rules were to apply to pending cases. Section 25 of Rule I (Juneau rules) reads in part as follows:

> "Section 25. *Construction.* . . . The provisions in the various sections of this rule shall be liberally construed for the protection of the public, the courts and the legal profession, and shall apply to all *pending matters* of misconduct and reinstatement *so far as may be practicable*, and to all future matters notwithstanding the alleged misconduct occurred prior to the effective date hereof. To the extent that application of any provision of this rule to any pending matter shall not be practicable, the rules in effect at the time this rule becomes effective shall continue to apply." [Ex. B, pp. 18-19, Motion to Defer Decision.] (Emphasis ours.)

On January 30, 1965, the Alaska court filed a written opinion suspending MacKay from the practice of the law for one year.[3] This decision did not consider the application of the Juneau rules to the MacKay matter as on the day before, January 29, 1965, the court had expressly provided (by Order No. 75) that the Juneau rules did not apply to pending cases.

But if the Alaska court was of the opinion that the settlement did not require that the Juneau rules should apply to a "pending" case, it was an opinion not shared by the members of the Alaska Bar Association or its board of governors. The order of the Alaska court which qualifiedly approved the Juneau rules was followed the next day by the decision in the matter of MacKay, which refused to apply the Juneau rules to a "pending" case. The reaction of the bar was as might be expected. A special convention of the Alaska Bar Association was called in Anchorage on February 15, 1965. A resolution was adopted which instructed counsel for the Alaska Bar Association to request a decision in the matter then pending in the U.S. District Court. The board of governors submitted the same question by plebiscite to all members of the Bar of Alaska and the members voted for an immediate decision. The defendants made a motion for dismissal in the U.S. District Court, or, in the alternative, for summary judgment.

The matter was called for hearing on June 15, 1965, before the three-judge U.S. District Court in Anchorage, Alaska. The defendants contended that there had been an accord and satisfaction at the Juneau meet-

[3]The order pursuant to decision was dated February 8, 1965. This order has been stayed pending petition for certiorari to this Court. [Exs. C, D, Pet. for Cert.]

ing, which required a dismissal of the action. The plaintiffs (Alaska Bar Association and bar members) contended that there had been an accord but no satisfaction, in that the defendants had given only qualified approval to the Juneau rules. During the course of proceedings, Thomas Stewart, administrative director of the Alaska court system, testified that paragraph 3 had been inserted in Order No. 75 by inadvertence. He advised the Federal judges that the Alaska court wished to comply with the Juneau settlement.[4] A judge of the U.S. District Court expressed the view that the bar had fully complied with the agreement but that the defendants had not complied. (Proceedings, U.S. District Ct. p. 92, line 17, to p. 93, line 1.) The lawyer for the Alaska Bar Association stated that if the Supreme Court of Alaska would adopt the Juneau rules *nunc pro tunc* as of January 29, 1965, without qualification, the action should be dismissed pursuant to the stipulation. (Proceedings, U.S. District Ct. p. 89, line 26, to p. 90, line 1.)

On June 16, 1965, the U.S. District Court ordered that the action should be dismissed when the Supreme Court of Alaska entered an order making the Juneau rules effective as of January 29, 1965. The Alaska Supreme Court did enter such an order and the action was dismissed. Plaintiffs thus accomplished the purpose of the hearing (1) to obtain unqualified

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[4]In the Memorandum of the Supreme Court of Alaska filed in reply to petition for certiorari, it is said, "thereafter the bar association attempted to repudiate the settlement upon various grounds. . . ." (Memo., Appendix 8, p. 2.) This is, of course, contrary to the facts disclosed in the proceedings in the Federal District Court on June 15 and 16, 1965. The members of the Alaska court were forced to comply with the terms of the settlement as a condition of dismissal.

approval of the Juneau rules; and (2) to make them applicable to all "pending" matters.

Following the entry of the order, which made the procedural rules applicable to pending cases as of January 29, 1965, MacKay petitioned the Supreme Court of Alaska for reconsideration of its decision of January 30, 1965 and its order of February 8, 1965, which suspended him from practice for a period of one year. In that petition he urged that the Juneau rules should be applied to his matter and that the failure to give him the benefit of the rules would deny him the equal protection of the laws of Alaska in violation of his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Alaska Supreme Court failed to act promptly on the petition for reconsideration in the matter of MacKay. On September 15, 1965, MacKay advised this court that events had occurred which might render moot certain issues presented by the petition for certiorari, and urged that the Supreme Court of Alaska should be given the opportunity to rule on his petition for reconsideration in the light of those events. The motion was granted, and this court entered an order to defer decision on petition for certiorari until the Alaska Supreme Court could pass on the questions presented by MacKay's petition for reconsideration.

On May 31, 1966, the Clerk of the Supreme Court of the United States received in the mail an opinion of the Supreme Court of Alaska (dated May 13, 1966),

which denied petition of MacKay for reconsideration. As a result certain issues presented by the petition for certiorari have been rendered moot by the recited events and by the decision of the Supreme Court of Alaska. MacKay has now an additional reason to Petition for Certiorari.

Questions Presented in the Original Petition Which Are Now Moot.

Questions 1 and 2, presented on page 2 of the petition, are now moot. The action in the Federal District Court has been dismissed. There is no need for this Court to determine whether or not the Supreme Court of Alaska should have deferred a decision on Federal and Constitutional questions, which were at that time pending before the Federal District Court; there is no need to determine whether the judges of the Supreme Court of Alaska were biased by reason of their position as defendants in the action before the Federal District Court.

Questions Presented and Remaining for Decision.

The events above recited reduce the problem on petition for certiorari to the following questions:

1. Did the Supreme Court of Alaska deprive this petitioner of property without due process of law and fail to give him the equal protection of the laws when it suspended him from the practice of the law:

(a) By a decision based on facts taken from incomplete uncertified hearsay copy of a transcript of

notes from a stenographer who had no official position?

(b) By failing to give petitioner due notice of charges against him, the right to confront witnesses called against him, and the right to cross-examine said witnesses?

(c) By giving retroactive effect to a rule of court in a bar discipline case? [pp. 2-3, Pet. for Cert.]

2. After acquittal of charges against petitioner by the administrative authority which was authorized to hear such charges by the Alaska statute, is the Supreme Court of Alaska estopped to revive and reconsider these charges?

And an additional question presented by this supplement to the petition: [p. 3, Pet. for Cert.]

3. Was petitioner MacKay refused the equal protection of the laws of Alaska when the Supreme Court of Alaska refused to apply its own procedural rules to MacKay's pending matter?

ARGUMENT.

I.

The Due Process Question.

The Supreme Court of Alaska has filed three decisions in the matter of MacKay: one on October 26, 1964, the day before the case was called for trial in the U.S. District Court; one on January 30, 1965, ordering the suspension of MacKay from the practice of law for one year; and the third on May 27, 1966 (dated May 13, 1966), which denied MacKay's petition for reconsideration. In each decision the court purports to quote facts from a record. What record? The court confesses in its decision that it had before it no certified record from a trial committee or from the board of governors of the Alaska Bar Association. Under the rules, the trial committee must certify a record of evidence taken before it to the board of governors of the Alaska Bar Association. Under the statute, the board of governors is the only body authorized to make findings and certify a written record of evidence taken at a hearing to the Supreme Court of Alaska (§6, Chap. 1788 LA 1960). The association records which were unlawfully seized by the members of the court, contained no record of the hearing before the trial committee nor of any record of any oral hearing before the board of governors. Only the minutes of the board meeting were seized. [P. 3, Ex. A, Pet. for Cert.] The court described the informal method by which it obtained the facts which it quotes as literal truth in its three decisions. "Inquiry of the then president elicited the com-

ment that he believed that since the case was disposed of in favor of the accused the records were all destroyed. The court succeeded in obtaining copies of the pleadings from a member of the trial committee and a transcript of the testimony from the court reporter." [P. 5, Ex. A, Pet. for Cert.] The original transcript of record was forwarded with all exhibits to the board of governors in 1961. Some three years later, an employee of the Supreme Court of Alaska obtained from one Bonnie Dodd an uncertified collection of transcribings without exhibits. [Pp. 41, 42, Ex. E, Pet. for Cert.] So the Supreme Court of Alaska has nothing before it which certifies to the truth or accuracy of trial proceedings or oral proceedings before the board of governors.

If the Supreme Court of Alaska wished to revive the charges against MacKay in August 1964, it could have followed two procedures which would have adequately protected the rights of MacKay to be confronted with witnesses and the right to be heard. It could have ordered the board of governors to certify a full record to the court; that is, a transcript of evidence, plus exhibits, and a transcript of proceedings before the board of governors, as well as minutes of those proceedings. This it did not do and it is no excuse for the court to say that it was the board's statutory duty to certify the record to the court. This is a confession that the court has no record before it. The Supreme Court of Alaska could have initiated a new hearing of the charges with notice to MacKay. This procedure the court did not adopt. Instead employees of the court searched various areas where information might be found and the court relied on this uncertified hearsay to disbar and then later to suspend MacKay from the

practice of the law. This procedure is indefensible. Without a record, an appellate court cannot review. To act on the written words of an uncertified record is to act on hearsay and to deprive the accused of a right of confrontation and cross-examination of witnesses. In addition, the court deprives MacKay of the equal protection of the laws. No lawyer of Alaska before or since has been disciplined on an uncertified record.

II.

MacKay Is Entitled to the Benefits of a Court Rule Adopted by the Supreme Court of Alaska Before Its Decision in the Matter of MacKay.

This controversy began in August 1964, when the Supreme Court of Alaska claimed the right to review the MacKay decision by reason of its inherent power to discipline members of the Alaska Bar. The court has since that time adopted rules of procedure which restrict its "inherent power" to review proceedings before the board of governors of the Alaska Bar Association. The Court has ordered that dismissal of a complaint against a member of the Alaska Bar will not be reviewed and that the record shall remain in the office of the association. This is an exact description of the procedure followed in the matter of MacKay, in 1961. The rules also provided that the new rules "shall apply to all pending matters of misconduct and reinstatement so far as may be practicable. . . ."

The petition for reconsideration required the Alaska court to explain why it would not apply its rules to the MacKay matter. In the recent decision (May 13, 1966), the Alaska court refused to give MacKay the benefit of it own rules: it declared that MacKay's matter

was not a "pending" matter on January 29, 1965; and it declared that was not "practicable" to apply the new rules to the MacKay matter.

(a) The MacKay Matter Was a "Pending" Matter Within the Meaning of the Rules on January 29, 1965.

The decision states that the MacKay matter was final and not pending when the new rules went into effect on January 29, 1965. "Respondent's matter had been fully processed and disposed of by decision and order and was not a pending case at the time Rule I was agreed upon." (P. 14, Opinion, May 13, 1966.) But the court declares that the term "pending" is "synonymous with or connoting 'depending, remaining undecided, not terminated.'" (P. 20, Opinion, May 13, 1966.) Each adjective describes the status of the proceedings against MacKay. A rehearing had been granted MacKay in November 1964; the matter was not "terminated" as it awaited decision; it remained "undecided" as evidenced by the later opinion of the court on January 30, 1965. None of the cases cited in the opinion of the Alaska Supreme Court (May 13, 1966) which purport to define the term "pending" are persuasive or pertinent to the question. A matter is "pending" as long as it is under appellate review. If a statute under which a defendant is convicted of a crime is repealed pending appeal, the conviction must abate. (*Bell v. Maryland*, 378 U.S. 226; *Hamm v. City of Rock Hill*, 379 U.S. 306.)

The Alaska Supreme Court states "the construction of 'pending' as aided by the above-mentioned authorities precludes the obvious absurdity that proceedings initiated, conducted, and concluded under a previous statute must be obliterated and recommenced." (Pp. 24, 25, Opinion, May 13, 1966.) But the statute under which

proceedings against MacKay were initiated and conducted also precludes review by the court after the matter was "concluded" by a dismissal of charges against MacKay.

(b) It Is Practicable to Apply the Rules of Court to the MacKay Proceedings.

The Alaska Supreme Court in its denial of petition for reconsideration declares it would not be "practicable" to apply the rules adopted January 29, 1965, to the review of the MacKay proceedings. The court makes blanket statements but gives no good reason why the procedure under the new rules is not practicable. This was the practice before January 29, 1965. (The Alaska Integrated Bar Act so provides.) It has been the practice since January 29, 1965. The Supreme Court of Alaska has attested to the reasonableness of the procedures by adopting this rule of "no review of dismissals". Unless the rules are followed in the matter of MacKay, he will be the only lawyer in the history of the Alaska Bar who was not given the benefit of a procedural rule which has been declared by both the legislature and the Alaska Supreme Court as a reasonable procedure. This is discrimination to the extreme. The only reason given by the court for the "impracticable" effect of the rule in the matter of MacKay is that the matter was not "pending" on January 29, 1965.

"Obviously it would not be a practicable thing to annul the entire proceedings, including final disposition in this case, and hold that the matter should be processed anew." (P. 20, Opinion, May 13, 1966.) But the rules do not require that the matter "be processed anew". They require that the processing by the board of governors, which resulted in a dismissal of the charges on

December 1, 1961, shall be final. Particularly ineffective is this feeble effort to excuse a refusal to apply the law equally to MacKay as to all others, when we reflect that if the decision stands, MacKay will be the only Alaska lawyer before or since January 29, 1965, who will be disciplined after charges have been dismissed against him by the board of governors of the Alaska Bar Association.

Conclusion.

This has been a distressing experience for the Bar and Bench of Alaska. The Alaska Bar Association went to court to establish the principle that all lawyers of Alaska should be given equal treatment. We can now only appeal to this court to enforce that principle.

Respectfully submitted,

JOSEPH A. BALL,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 88

In the Matter of Disciplinary Proceedings Against NEIL S. MACKAY, an Attorney at Law,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of the State of Alaska.

PETITION FOR REHEARING.

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No. 88
(Rehearing)

Errata.

Index — Schware v. Board of Bar Examiners, 353 U.S. 232, in place of 303 U.S. 232.

p. 1 — fourth line from bottom should read (1957), 353 U.S. 232, in place of 303 U.S. 232.

p. 2 — third line from top, word *acquired* should be *acquitted*.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 88

In the Matter of Disciplinary Proceedings Against NEIL S. MACKAY, an Attorney at Law,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of the State of Alaska.

PETITION FOR REHEARING.

Petitioner presents its petition for a rehearing of this Court's order dated June 20, 1966 denying the petition for a Writ of Certiorari to the Supreme Court of the State of Alaska, and, in support thereof, respectfully shows:

Grounds for Rehearing

This Court should re-examine the decision of the Supreme Court of the State of Alaska which excludes the petitioner from the practice of law in the context of this Court's decisions in *Schware v. Board of Bar Examiners* (1957), 303 U.S. 232, and *Konigsberg v. State Bar of California* (1957), 353 U.S. 252. The applicability of those decisions is a substantial ground which has not been previously presented to this Court.

In this case the Supreme Court of the State of Alaska was unable to obtain a certified record of evidence taken at the hearing in which the petitioner was acquired. That Court did not initiate new charges against the petitioner who is an attorney. The Court then made its decision excluding the petitioner from the practice of law without notice to him. Petitioner, therefore, has not been confronted with any witnesses. Consequently he has had no opportunity for cross-examination. Accordingly, the petitioner's suspension from the practice of law by the Supreme Court of the State of Alaska has deprived the petitioner of due process of law.

This Court recognizes the right to confrontation as indispensable to due process in state criminal cases (*Pointer v. Texas* (1965), 380 U.S. 400; *Douglas v. Alabama* (1965), 380 U.S. 415). Moreover, this Court has granted certiorari and reversed state court decisions where attorneys have been excluded from the practice of law in state proceedings when there has been a deprival of due process. In *Schware v. Board of Bar Examiners* (*supra*) and *Konigsberg v. State Bar of California* (*supra*), this Court held that the petitioners' exclusions from the practice of law raised issues under the Fourteenth Amendment. The petitioners had been disqualified by state bar committees after hearings concerning their moral character. This Court held that the committees' findings were so arbitrary that they deprived the petitioners of due process under the Fourteenth Amendment.

In *Schware v. Board of Bar Examiners* (*supra*), this Court stated at page 237:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment."

The failure of the Supreme Court of the State of Alaska to give notice and permit the petitioner to cross-examine witnesses, as shown here, deprived petitioner of due process as it did to the attorneys in *Schware* and *Konigsberg*.

Furthermore, in *Pointer* and *Douglas* this Court held that the petitioners' right to confrontation and cross-examination was an indispensable requirement of due process:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. . . ." (*Pointer v. Texas* (*supra*), at p. 405).

This right is equally cogent in an attorney's disciplinary proceeding. This Court recognized the necessity of due process guarantees in state disciplinary proceedings in *Konigsberg*, at p. 255:

> "While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer."

The petitioner presents facts showing a deprivation of his opportunity of confrontation and cross-examina-

tion by the Supreme Court of the State of Alaska at the time that Court made its determination to exclude him from the practice of law. This petition should be granted and the writ issued after further consideration because the deprivation of due process raised here is as vital and evident as the deprivation incurred by the attorney petitioners in *Schware* and *Konigsberg*.

Conclusion.

The petitioner urgently requests that this petition for a rehearing be granted so that this Court may consider the applicability of due process requirements to attorney disciplinary proceedings as defined by this Court in *Schware* and *Konigsberg*.

Respectfully submitted,

JOSEPH A. BALL,
Attorney for Petitioner.

Certificate of Counsel.

I, JOSEPH A. BALL, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and it is restricted to the grounds specified above.

JOSEPH A. BALL,
Attorney for Petitioner.

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IN THE

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No. 88

In the Matter of Disciplinary Proceedings Against
NEIL S. MACKAY, an Attorney at Law,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of the State of Alaska.

AMICUS CURIAE BRIEF OF ALASKA BAR ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA AND IN SUPPORT OF PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1965

No. 88

In the Matter of Disciplinary Proceedings Against NEIL S. MACKAY, an Attorney at Law,

Petitioner.

On Petition for Writ of Certiorari to the Supreme Court of the State of Alaska.

AMICUS CURIAE BRIEF OF ALASKA BAR ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA AND IN SUPPORT OF PETITION FOR REHEARING

The Alaska Bar Association presents its amicus curiae brief in support of the petition for Writ of Certiorari and in support of petition for rehearing of this Court's order dated June 20, 1966 denying the petition for a Writ of Certiorari to the Supreme Court of the State of Alaska, and, in support thereof, respectfully shows:

Grounds For Rehearing

The Alaska Bar Association was created as an agency of the Territorial government in 1955. Patterned closely after the Washington State Bar Association, the hallmark and proudest privilege of the Alaska Bar Association has been the rights and obligations of self-government and self discipline granted by the statute which created the association. In 1959, the Alaska Bar Associa-

tion became an agency of the government of the new state (A.S. 08.08.010). The organized bar of Alaska is enshrined in the Constitution of Alaska (Art. IV, Sec. 8), which bestows important duties upon the Alaska Bar Association in connection with the selection of judges under the Alaska version of the Missouri plan.

On June 1, 1964, the Justices of the Supreme Court of Alaska attempted by court order and rule to abolish the Alaska Bar Association as a statutory agency of the state government and to substitute in its place a "reintegrated" state bar founded upon court rule and subject entirely to control by the members of the Alaska Supreme Court.

Many features of the proposed court-integrated State Bar Association were repugnant to the lawyers of Alaska — none more so than a provision in the new court rules to the effect that a dismissal by the Board of Governors of the Alaska Bar Association of charges of misconduct tried by the Association would not be effective, but would in all cases be subject to redetermination by the members of the Court. To the lawyers of Alaska this was an unsatisfactory substitute for the privilege of self-government bestowed upon the integrated bar by the Alaska legislature, as in Washington and California.

An impasse was reached when officials of the statutory Bar Association respectfully declined to serve in the new association projected by the members of the Court. The upshot was that ex parte orders were issued by the three members of the Court, directing the State Police to seize the assets of the statutory Bar Association and purporting to remove the officers and Board of Governors from office. The Alaska Bar Association and its members responded by filing an action in the United States District

Court for the District of Alaska at Anchorage, seeking to vindicate numerous federal constitutional rights which the members of the Alaska Bar Association believed had been violated by the Justices.

The members of the Court resurrected in 1964 a disciplinary complaint against petitioner Neil S. Mackay, of which he had been duly acquitted by the Board of Governors of the Alaska Bar Association in accordance with A.S. 08.08.220 in December, 1961. The members of the Court used the Mackay case for the purpose of making declarations of state law for the guidance of the three Judges of the United States District Court before whom the Justices were themselves cast in the role of defendants. The District Court formally ruled that it had jurisdiction. The District Court also plainly indicated at the trial of the Bar Association's case that the Association's federal constitutional rights would, if necessary, be protected by the judgment of the Court. Whereupon, the Justices abandoned their attempt to take over the Alaska Bar Association, totally withdrew the rules which the Court had promulgated, granted recognition to the statutory bar association, vacated all orders aimed at the Association and its officers, and joined with the Alaska Bar Association in adopting revised rules of admission and discipline, which rules specifically preserved the profession's right of self-discipline. By the new rules the members of the Court agreed not to review disciplinary cases in which charges had been considered and dismissed by the Board of Governors.

In their haste to declare as the law of Alaska that which would bolster their position as defendants in the United States District Court, the Justices proceeded against petitioner Mackay without the benefit of a certi-

fied record of the proceedings had in 1961, and without the exhibits which pertained to those proceedings. Instead, acting entirely on hearsay, and without affording petitioner Mackay the right to be confronted by any witnesses, the Justices declared petitioner guilty of "cheating" a client, and pronounced disbarment upon him. In the Matter of Disciplinary Proceedings Against Neil S. Mackay, 416 P.2d 823 (1964).

Petitioner Mackay is the only lawyer in our brief history to be disciplined by the Justices on charges dismissed by the Board of Governors, nor do the members of the Court maintain that there was any irregularity in the proceedings before the Bar Association. The statute under which petitioner was tried by the Association provides that a dismissal by the Board of Governors is final. The same result obtains under court rules agreed to by the members of the Court at Juneau in December 1964, and subsequently ratified by the Alaska Bar Association and adopted by the members of the Court. The rules under which the Justices agreed not to review dismissals by the Board of Governors were agreed to and adopted while the resurrected Mackay case was pending before the members of the Court.

The result is that Mackay has been deprived of the equal protection both of the statute under which he was acquitted and the court rules under which his acquittal was not subject to review by the members of the Court. Of the nearly 250 members of the Alaska Bar Association, petitioner is the only one ever to be afforded such treatment.

There is no hint of any irregularity in the proceedings which resulted in petitioner's acquittal. Accordingly, petitioner's right to the equal protection of the Alaska

statute and court rules would prevent the resurrection of stale and unfounded charges, ancillary to unrelated litigation in the United States District Court, in which petitioner and the Justices of the Supreme Court of Alaska happened to be plaintiff and defendants, respectively.

Mackay's alleged misconduct related to a personal real estate transaction with a sometime client, and had no connection whatever with proceedings before any court. Thus the alleged misconduct in no way related to the business or work of the Supreme Court of Alaska, and was on the contrary squarely within the ambit of complaints entrusted to the tribunals of the organized bar by the statutes and court rules of Alaska, Washington, and California, as indeed the parties were personally advised by the Chief Justice of Washington, who traveled to Juneau in December 1964 to help the Alaska bench and bar with their problem.

Assuming that petitioner's right to equal protection of the laws did not prevent the resurrection of a charge of which he had been acquitted, then we urge that the Due Process Clause of the Fourteenth Amendment required that in the absence of any proper or certified record of the 1961 proceedings, petitioner should have been afforded a hearing and the right to be confronted by and cross-examine any witness against him.

The very existence of the Mackay case, as well as the unprecedented circumstances under which it arose, leaves every lawyer practicing in Alaska at the present time under a cloud of fear and doubt concerning the power of the members of the Supreme Court of Alaska to set upon lawyers without notice or hearing, in disregard of statutes and court rules, and in violation of

their rights to due process and equal protection which we claim under the Constitution of the United States. The very existence of the Alaska Bar Association as an independent bar association is threatened by what happened to petitioner in this case.

Conclusion

Therefore, the Alaska Bar Association urges this Court to grant the petitions for a Writ of Certiorari to the Supreme Court of the State of Alaska.

Respectfully submitted.

Signed.....

GEORGE FRANK BONEY
Attorney for Alaska
Bar Association

Certificate of Counsel

I, G. F. BONEY, counsel for the Alaska Bar Association, Amicus Curiae, do hereby certify that the foregoing brief in support of petition for Writ of Certiorari and petition for rehearing is presented in good faith and not for delay, and it is restricted to the grounds specified above.

Signed.....

GEORGE FRANK BONEY
Attorney for Alaska
Bar Association,
Amicus Curiae